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DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. W-02-589 TAHUN 2003

ANTARA

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**ARAPROP DEVELOPMENT SDN BHD
(No. Syarikat: 183803-A)**

.... PERAYU

DAN

**LEONG CHEE KEONG
(No. K/P: 630226-10-7545)**

**.... RESPONDEN
PERTAMA**

**GRACE LEONG LAI CHING
(No. K/P:680619-10-5642)**

**.... RESPONDEN
KEDUA**

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[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

BAHAGIAN SIVIL

SAMAN PEMULA NO. S2-24-3734-2001]

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**Dalam perkara mengenai Perjanjian
Jual Beli bertarikh 15hb September
1996 Perjanjian Pinjaman bertarikh
30hb September 1998, Suratikatan
Penyerahanhak bertarikh 30hb
September 1998 dan Suratikatan
Bersyarat Penyerahan Semula
Sebahagian Hak bertarikh 7hb Ogos
2001**

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Dan

**Dalam perkara mengenai hartanah yang
dikenali sebagai Plot 2-188, Bukit**

A dated 4.1.2002.

The Judge held on the facts presented before him that the Sale and Purchase Agreement dated 15.9.1996 (SPA) executed between the Defendants (Appellants in this appeal) as vendor on the one part, and the Plaintiffs (Respondents in this appeal) as purchaser on the other part, of a bungalow lot known as Plot No. 2-1888, Bukit Mahkota, Phase 2, Mukim Beranang, Daerah Ulu Langat, Selangor Darul Ehsan (“the Property”) had been validly terminated by the Respondents on 30.6.2001. The Appellants were then ordered to return to the Respondents the sum of RM217,011.50 representing 80% of the purchase price which had been paid by the Respondents to the Appellants towards the purchase, as well as RM8,111.00, the amount paid by the Respondents’ financier Malaysia Building Society Bhd (MBSB) to the Appellants together with interest. The learned Judge further directed reimbursement of the legal costs incurred by the Respondents to perfect the SPA amounting to RM3,818.56, as well as interest on the RM217,011.50 and RM8,111.00, from the date of filing of the action to the date of payment to the Respondents.

I have had the advantage of reading the judgment of Mokhtar JCA in draft. I agree with his findings that the Deed of Assignment executed in this case was an absolute assignment and not by way of charge only. I am also in agreement with the subsequent finding that when the

A Respondents commenced proceedings against the Appellants on 16.10.2001, they had the capacity to do so for the reasons stated in the judgment.

Be that as it may, in respect of the main issue as to whether the SPA had been validly terminated by the Respondent, my view differs for the following reasons.

On the facts of this case delivery of vacant possession of the said property was to be effected within 30 calendar months from the date of the SPA i.e. by 15.3.1999. Time was made of the essence to the contract by clause 16(2) of the SPA. If the said property was not delivered within the agreed period, the Appellant would pay the Respondent liquidated damages to be calculated on a daily basis at the rate of 8 % p.a. of the purchase price.

D The SPA requires the Appellants to provide what is described as "basic infrastructure work". From the Third Schedule to the SPA, the completion of the basic infrastructure work was the last stage before the delivery of vacant possession. The Fourth Schedule to the SPA, shows that the basic infrastructure includes telephone services and electrical infrastructure. It is clear from the evidence on record that there was a delay in completion of the basic Infrastructure work.

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The record also shows that as early as at November 1998, the Appellants had completed all that they could under the project leaving that which is to be completed by TNB. The delay in completing the electrical infrastructure was the cause of delay in delivery of vacant possession. As

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at March 2000 (delivery of vacant possession was due by 15.3.1999), the electrical infrastructure works were still not completed by TNB and the Appellants was still pressing for the supply of electricity by TNB. In this circumstance the learned Judge was clearly right in finding that there has been a breach of the SPA by the Appellants. The issue for determination

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is what are the rights and obligations of parties to a contract in such a situation?

Section 40 and 56 of the Contracts Act 1950 (“the Act”) provides that-

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“40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

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56. (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract

A or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.”

Section 40 of the Act uses the phrase “*In its entirety*” in describing
B the extent of the breach. The contract breaker must have “*refused to perform ... his promise in its entirety*” before the “*promisee may put an end to the contract*”. Section 56(1) of the Act uses the phrase “*fails to do any such thing at or before the specified time*” to describe the nature of the breach which would make a contract voidable.

C From the authorities I understand the legal position to be as follows:
Where a promissory wrongfully repudiates a contract in its entirety, the promisee has a choice. The promisee may elect to accept the repudiation, and treat the contract as at an end, and sue for damages. The primary
D obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. [See *Moshi v Lep Air Services* (1973) AC 331]. Alternatively, the promisee may elect to reject the repudiation and treat the contract as subsisting. The Court has to make an objective appraisal of the facts from the words and conduct of the parties as to which course was adopted. An election once made is
E irreversible (*Sergent v ASL Development Ltd* 1974) 131 CLR 634, 655).
For the doctrine of repudiation to apply, the breach must go to the root of

A the contract [See *Mayson v Clouet & Anor* (1924) AC 980; *Bowes v Chalever* (1923) 32 CLR 159; *Kong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* (1962) 2 QB 26]

In *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties sdn*

B *Bhd* (1999) 2 MLJ 500 Gopal Sri Ram JCA said:

C “The right of an innocent party to put an end to future obligations under a contract is sometimes referred to as “the right to rescind” and the act of termination as “rescission”. This terminology is erroneous and misleading. True rescission is specific relief. It is available to a litigant either as self-help upon satisfaction of certain conditions. (See *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525) or as judicial remedy obtainable in an action. It was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950. It has the effect of setting at naught the contract *ab initio* and not merely as to obligations *de futuro*. It places the parties on a footing as though the contract had never been made. The difference between the so called “rescission” which is in truth nothing more than the act of terminating future obligations under a contract and rescission in its true sense is brought out in the following passage in the speech of Lord Wilberforce in *Johnson v Agnew* (1980) AC 367, at pp 392, 393:

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A “ At this point it is important to dissipate a fertile source of confusion and make clear that although the vendor is sometimes referred to the above situation as “rescinding” the contract, this so called “rescission” is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud, or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion). In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about “rescission ab initio”.”

D Lord Wilberforce repeated this in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 AER 556 when he said-

E “.. when in the context of a breach of contract one speaks of “termination” what is meant is no more than that the innocent party or in some cases, both parties are excused from further performance. Damages, in such case, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract

A itself says about damages, whether it “liquidates” them, or
limits them, or excludes them? These difficulties arise in
part from uncertain or inconsistent terminology. A vast
number of expressions are used to describe situations
where a breach has been committed by one party of such
a character as to entitle the other party to refuse further
performance; discharge, rescission, termination, the
B contract is at an end, or dead, or displaced; clauses
cannot survive or simply go. I have come to think that
some of the difficulties can be avoided; in particular the
use of “rescission”. Even if distinguished from rescission
ab initio, as an equivalent for discharge,... may lead to
confusion in others. To plead uniformity may be to cry for
the moon. But what can and ought to be avoided is to
C make use of these confusions in order to produce a
concealed and unreasoned legal innovation...”

 Learned Counsel for the Respondents in supporting the orders
made by the learned judge argued that on the facts of this case, the
learned judge was entitled to set aside the whole transaction. Having
D found that the SPA had been rightfully terminated, according to him, the
learned judge had, rightly, to unravel the transaction and restore the
parties to their original position as if the contract had never been made.
This involved the return of all monies not only towards the purchase price
of the said property, but other financial charges and expenses which the
E Respondents had to bear towards the purchase. He submitted that the
Appellants’ breach in failing to deliver the said property together with the

A agreed infrastructure facilities within the specified time rendered the contract voidable by reason of section 56(1) of the Act. The Respondents had avoided the contract by their letter of termination dated 30.6.2001 and were entitled to *restituo in integrum*.

B With respect, I am unable to agree with the Respondents argument. At common law the right to “rescind” a contract by way of termination only arises when there has been a total failure of consideration. On the facts of the present case, there was no refusal by the Appellants to perform the contract by not doing the things they promised to do within the time specified by the contract in its entirety.
C There was no total failure of consideration. From the Certificate for Stage of Construction of Works, it is clear that the Appellants had completed their part of developing the said property on 27.4.1998 which was more than a year before the date for delivery of vacant possession, (i.e. more than a year before 15.3.1999). What remained to be completed was the
D “Remaining Basic Infrastructure”.

It is evident from the record that the Appellants had problems with TNB and there was delay in the electricity infrastructure. The delay in delivering up the property was caused by delays of the relevant
E authorities in circumstances beyond the Appellant’s control. This did not in my judgment amount to a failure to do all of the things that the Appellants

A had promised. This is not a case where there was a fundamental breach on the part of the Appellants resulting in the Respondents being deprived of the whole benefit which was the intention of the parties they would obtain from the contract. Applying section 40 of the Act, I am of the view that the Appellants' breach did not go to the root of the contract.

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By allowing the delivery dates to pass by and by acquiescing in the work continuing under the agreement, the Respondents must be held to have waived their right to rescind the SPA on account of repudiation and also the right to treat themselves as discharged therefrom. On the facts, they must be deemed to have elected to treat the SPA as still continuing [*Slim Chio Huat v Wong Ted Fui* (1983) 1 MLJ 151, Federal Court].

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As for delay in delivery, clause 16(2) provides for the formula for compensation which the Appellants must pay for their lateness. I am of the view that this is the clause which the Respondents should seek recourse to as it created a contractual obligation to pay a sum by way of liquidated damages for the period during which they were kept out of the property which they had purchased, such sum being calculated upon the basis set out in the agreement. [See, *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* (1987) 2 MLJ 1]

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A For the reasons given, I am therefore unable to agree with the conclusion of the High Court Judge. I am of the view that the learned Judge had erred in holding that the SPA had been lawfully terminated, and consequentially also in ordering a refund of the purchase price paid as well as the other financial charges or disbursements.

B On my part, I would allow the appeal with half costs to be awarded to the Appellants. The orders of the High Court are set aside. In their place I would enter judgment for the Respondents for damages for late delivery to be assessed by the Senior Assistant Registrar of the High Court. The deposit to the Appellants.

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DATIN PADUKA ZALEHA ZAHARI
Judge
Court of Appeal
Malaysia

Dated : 17th September 2007

D Note:

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