DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. W-02-589-2003

ANTARA

ARAPROP DEVELOPMENT SDN BHD … PERAYU

DAN

1. LEONG CHEE KONG
(NRIC NO: 630226-10-7545)

2. GRACE LEONG LAI CHING … RESPONDEN-
(NRIC NO: 680619-10-5642) RESPONDEN

[Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
(Bahagian Sivil)
Saman Pemula No: S2-24-3734-2001

Antara

1. Leong Chee Kong
(NRIC No: 630226-10-7545)

2. Grace Leong Lai Ching (F)
(NRIC No: 680619-10-5642) … Plaintif-plaintif

Dan

Araprop Development Sdn Bhd … Defendan]

Coram:

Mokhtar Sidin, J.C.A.
Tengku Baharudin Shah Tengku Mahmud, J.C.A.
Zaleha Zahari, J.C.A.

MAJORITY JUDGMENT

On 15.9.1996, the appellant and the respondents executed a Sale and Purchase Agreement (S&P) whereby the respondents agreed to purchase and the appellant agreed to sell a piece of property known as Plot No. 2-188, Bukit Mahkota, Phase 2, Mukim Beranang, Selangor Darul Ehsan in the sum of RM281,445.00. The respondents have paid RM217,011.50 equivalent to 80% of the purchase price based on the certificates issued by the architect. To finance the balance of the purchase price the respondents obtained a loan from Malaysia Building Society Berhad (MBSB) in the sum of RM64,400.00. Out of this sum MBSB paid RM8,111.00 to the appellant.

Under the terms of the S&P the appellant should deliver vacant possession of the said property to the respondents within 30 months from the date of signing the agreement. Vacant possession of the said property should be delivered by the appellant to the respondents on or before 15.3.1999. Though the respondents stated that vacant possession should be delivered on or before 15.6.1999, it was not disputed that the date of delivery of vacant possession should be 15.3.1999. It was also not disputed that there was a delay in delivering vacant possession of the

property. As a result of the delay the respondents terminated the S&P on 30.6.2001. It was also not disputed that the total number of days of the delay was 837 days. With the termination of the S&P the respondents' solicitors demanded the return of the total amount paid by them. When the appellant failed to return the amount paid, the respondents filed an Originating Summons dated 16.10. 2001 seeking, inter alia, the following:

(a) a declaration that the appellant have breached the terms of the S&P and the respondents were entitled to terminate the contract on 30.6.2001 or whichever date the court deems fit.

(b) the respondents are entitled to recover the sum of RM217,011.00 paid to the appellant being part payment of the purchase price already paid by the respondents;

(c) the appellant is to refund the sum of RM8,111.00 paid by MBSB to the appellant on behalf of the respondents and interest imposed by MBSB in respect of the loan given to the respondents;

(d) damages for late delivery of vacant possession from 15.3.1999 to the date of termination to be assessed as stipulated in the S&P;

(e) further damages and/or aggravated damages; and

(f) costs and interest thereon;

It is not disputed that the date of delivery of vacant possession was 15.3.1999 and not as stated in the O.S. and the affidavit in support of the application. In its affidavit in reply the appellant stated that though there was a delay in delivering vacant possession the respondents have no right to terminate the S&P and/or bring a claim against the appellant. The appellant also stated it was at all times ready, able and willing to fulfill its obligations under the S&P and any delay in delivering vacant possession was caused by circumstances beyond the appellant's control. For that reason, the appellant was not liable to the respondents in any manner whatsoever.

The appellant's affidavit further stated that the delay was beyond the appellant's control in that:

> "1. The appellant had appointed Maxis Broadband Sdn Bhd (formerly known as Bina Sat-Com Network Sdn Bhd, hereinafter referred to as "the telephone contractor") vide an agreement dated 27.8.1997 to carry out works to install the telephone services on the said property.
>
> 2. However, the telephone contractor failed to perform the works to install the telephone services on the said property within the agreed time frame.

3. The appellant, through its solicitors, Tetuan Azam Malek & Soh had written a letter to the telephone contractor on 7.5.1998 regarding this matter. (The correspondences in respect of this were exhibited in the affidavit)."

In the court below the appellant claimed that the telephone contractor had breached the contract when the contractor failed to perform the terms under the contractor's agreements and this is beyond the control of the appellant. The appellant further claimed that since 13.11.1996 it had applied to Tenaga Nasional Berhad (TNB) to supply electricity to the said property but TNB had neglected, failed or refused to perform the works including, but not limited to the supply of poles and cables to facilitate the supply of electricity. (The correspondences in respect of this were also exhibited in the affidavit). The appellant submitted that since TNB is the only company that provides electricity supply, the failure by TNB to supply electricity to the said property is beyond the control of the appellant. Despite that the appellant had endeavoured to hasten the TNB to complete the works.

The appellant submitted that the failure by the telephone contractor and the TNB to complete their works was beyond the control of the

appellant and as such the appellant is protected by Clause 22 of the S&P. Further, the appellant would not be liable.

In its affidavit, the appellant averred that the respondents failed to state their intention to strictly assert their rights and as such they have no right to terminate the S&P. The respondents failed to give any notice to the appellant soon after the discovery of the delay as provided for by Clause 16 of the S&P. Clause 16.1 provides that a proper notice be given on discovering the delay. Since the respondents failed to give a proper notice, the appellant was led to believe that the appellant was allowed to remedy the breach. Further, by their own action, the respondents had rendered that time was no longer the essence.

The appellant also submitted that if there was any breach, the respondents had already accepted it and for that reason the respondents' claim for the return of the sum already paid is inconsistent with their claim for damages. The S&P also provides for damages due to delay. The respondents in the present appeal are not allowed to apply for a declaration to terminate the S&P and at the same time claim for damages for late delivery under the S&P.

The learned judge in his judgment stated that the appellant failed to prove that the delay was circumstances beyond the control of the appellant. As such, Clause 22 of the S&P is not applicable to protect the appellant. The learned judge took the view that under Clause 13 of the S&P the appellant was under an obligation to ensure that the basic infrastructure works were to be in accordance with the Fourth Schedule of the S&P. The learned judge was also of the view that section 56 of the Contracts Act, 1950 gives the respondents the right to choose whether or not to continue with the S&P.

The learned judge then gave judgment in favour of the respondents and made the following order:

(i) a declaration that the S&P dated 15.9.1996 had been terminated on 30.6.1996 by the respondents;

(ii) the appellant has to return monies amounting to RM217,011.50 paid by the respondents to the appellant;

(iii) the appellant has to return monies paid by MBSB on behalf of the respondents to the appellant for the amount of RM8,111.00 together with interest thereon;

(iv) the appellant has to return all legal costs that had been paid to perfect the S&P in the sum of RM3,818.56;

(v) interest over the second and third from the date of filing of the action to the date of payment.

Not satisfied with that decision the appellant appealed to this court. Before us the appellant raised the following issues:

1. Respondents had no right to terminate.
2. The delay was beyond the appellant's control.
3. Waiver and/or estoppel.

1. *Respondents had no right to terminate*

Learned counsel for the appellant submitted that when the respondents purported to terminate the S&P by the letter dated 30.6.2001, the respondents did not have the capacity and the right to do so because on that date they had assigned all their rights, benefits and remedies under the S&P to MBSB. The Deed of Assignment dated 30.9.1998 states:

> " …. ASSIGNS absolutely to MBSB all the Assignor's(s') right title and interest in and to the Said Property and the full and entire benefit under the Sale Agreement together with all the stipulations contained therein and all remedies for enforcing the same which MBSB hereby accepts ….."

The appellant's counsel submitted that the effect of the assignment is that all the respondents' right, title and interest in the land and all benefits and remedies that the respondents had under the S&P had been

assigned to MBSB. The appellant then cited the cases of *Hipparion (M) Sdn Bhd* v. *Chung Khiaw Bank Ltd* [1989] 2 MLJ 149*; Phileoallied Bank (M) Bhd* v. *Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 and *Nouvau Mont Dor (M) Sdn Bhd* v. *Faber Development Sdn Bhd* [1984] 2 MLJ 268.

In reply, the respondents submitted that the assignment was not an absolute assignment but only intended as a security for a loan of RM64,400.00 of which RM8,111.00 was disbursed to the appellant. The respondents then cited the cases of *Sakinas Sdn Bhd* v. *Siew Yik Hau & Anor* [2002] 3 CLJ 275*; Tai Kim Yew & Ors* v. *Sentul Raya Sdn Bhd* [2004] 3CLJ 310 and *Hariram a/l Jayaram & 14 Ors* v. *Sentul Raya Sdn Bhd* [2003] 1 AMR 42. This is provided for under Sections 13 and 27 of the Loan Agreement with MBSB wherein it is stated that the assignment is required *"for better securing the repayment and payment of the loan and interest ..."* and that *"a charge ... be entered in favour of MBSB to secure repayment to MBSB of the balance loan then due and all other monies together with interest thereon ....".* The respondents also submitted that in equity it is also unreasonable to argue that there is an absolute assignment of rights to MBSB for the extension of a RM64,400.00 loan (of which only

RM8,111.00 was disbursed) while the respondents have themselves paid in excess of RM200,000.00 pursuant to the S&P.

The respondents further submitted that in any event MBSB had given its consent to the action whereby MBSB through the Deed of Conditional and Partial Reassignment dated 7.8.2001 had reassigned the right to take action to the respondents where it was clearly and expressly set out and indicate that the right to sue on the S&P is reassigned to the respondents and lies with them. This Deed of Conditional and Partial Reassignment was served on the appellant vide a letter dated 15.8.2001 and the appellant had knowledge of it.

Apparently, the learned judge did not touch on this in his judgment. Before us the appellant raised this issue again and it is for us to consider this. In my view, we have first to consider whether the assignment was absolute. If it is so, whether the Deed of Conditional and Partial Reassignment gave the respondents the right to institute the present case. The appellant relied on ***Hipparion (M) Sdn Bhd*** v. ***Chung Khiaw Bank Ltd*** [1989]2 MLJ 149. In that case the respondent, a licensed bank, entered into an agreement with the appellant, an incorporated company, whereby the respondent granted a loan of RM1m to the appellant repayable with

interest at the rate of 13.5% p.a. or such rate as the respondent may specify from time to time, in accordance with the terms and conditions specified in the agreement. It was also provided in the agreement that the appellant would remain in possession of a floor of a building in Penang as a contractual licensee only of the respondent. It was also provided that in the event of default in the payment of the instalment payments covenanted in the agreement the respondent was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after 14 days from the date of such demand, the respondent would have the right to terminate the licence of the appellant by notice in writing and to enter upon the property to deal with it as owner thereof in all aspects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer the property at such price and in such manner as the respondent deems fit and free from any interest of the appellant. By way of security for the loan the appellant also executed a deed of assignment whereby it assigned absolutely to the respondent all its right, title and interest in the said property in respect of a sale agreement whereby the appellant had bought the property from a company in Penang. The appellant defaulted in the instalments. The respondent, after issuing notices of demand and notices to the appellant commenced proceedings in

the High Court in Penang seeking a declaration of sum due and owing by the appellant under the agreement and also for an order that the appellant do quit and deliver up possession of the property within seven days of the service of the court order. Further, the respondent was to be at liberty to sell the property by public auction or private treaty. The learned judge gave judgment in favour of the respondent. On appeal the Supreme Court held that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. The deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the words 'absolutely'. Gunn Chit Tuan S.C.J. (as he then was) delivering the judgment of the court said at page151:

> " We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank*'s case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd* v. *Faber Development Sdn Bhd* that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Now, whatever the parties might have as lay men stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn Bhd of the

> one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of $1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:
>
>> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.
>
> Looking at the document we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property. … "

In ***Nouvau Mont Dor (M) Sdn Bhd*** v. ***Faber Development Sdn Bhd*** [1984] 2 MLJ 268, the appellant purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johore Bahru for the sum of $184,320.00. Subsequently, the appellant entered into an agreement with Public Bank, which agreed to give the appellant a fixed loan of $92,160.00. The appellant entered into a

loan agreement with the bank and also executed an assignment of all his rights, title and interest in the property pending the issue of the strata title to the bank. Subsequently, the respondent purchased from the developer the whole shopping and office complex excluding those units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings. The appellant appealed. The Federal Court held:

> "1. whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act,1956 is to be gathered only from the four corners of the instrument itself;
>
> 2. the document in this case was an absolute assignment not purporting to be a charge only within the meaning of section 4(3) of the Civil Law Act and therefore the appellant was not competent to maintain the action when it was filed."

In ***Phileoallied Bank (M) Bhd*** v. ***Bupinder Singh a/l Avatar Singh & Anor*** [2002] 2 MLJ 513, the respondents entered into a sale and purchase agreement with the developer to purchase a shop unit in the

Phileo Promenade, the Corporate Park in Kuala Lumpur. To finance the purchase, the respondents obtained a term loan from the appellant. The loan agreement cum assignment was entered into under which the respondents' rights, title and interest under the sale and purchase agreement were absolutely assigned to the appellant. The two respondents also executed a joint power of attorney in favour of the appellant. The loan was fully disbursed by the appellant. The individual strata titles had not been issued yet. The respondents had defaulted on the monthly payments. Consequent to the default, the appellant demanded repayment of the balance of the loan amount. As there was no response from the respondents, the appellant's solicitors sent a letter terminating the respondents' licence to occupy the relevant property. At the same time, they notified the respondents on the appellant's intention to sell the property. The advertisement to sell the property indicated that a public auction would be held. One day before the scheduled public auction, the respondents filed an originating summons and obtained an *ex parte* injunction to restrain the holding of the public auction of the property. The order was subsequently confirmed by the High Court after hearing both parties. The appeal to the Court of Appeal was dismissed. Leave was granted by the Federal Court on the question of whether a lender may,

without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge. In allowing the appeal the Federal Court held that whether or not an agreement was an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) of the Civil Law Act 1956, was to be gathered only from the four corners of the instrument itself. The Federal Court was of the view that the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision and therefore the respondents were not competent to maintain the action when it was filed. Abdul Malek Ahmad F.C.J. (as he then was) delivering the judgment of the court stated at page 517:

> " Three clauses in the loan agreement cum assignment stand out for consideration. The first is cl 8 which reads as follows:
>
> *8. Assignment*
>
> For the consideration aforesaid, the borrower hereby absolutely assigns to the bank the full and entire borrower's benefits, rights, title and interest in and to and under the sale agreement and in the said property together with the borrower's right of enforcement thereof or thereunder, PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provision of this assignment, the borrower shall and hereby undertakes to continue to observe, perform and be bound by all, whatsoever

> conditions, covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement."

Further down at page 519 his Lordship said:

> "Clause 8 thus makes it clear that upon its true construction, this is an absolute assignment under s 4(3) of the Civil Law Act 1956 ('the CLA') which states:
>
>> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee other person from whom the assignor would have been entitled to receive or claim, the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, the power to give a good discharge for the same, without the concurrence of the assignor.
>
> In *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru for the sum RM184,320. Subsequently, the appellant entered into an agreement with Public Bank which agreed to give the appellant a fixed loan of RM92,160. The appellant also executed an assignment to the bank of all his rights, title and interest in the property pending the issue of the strata title. Subsequently, the respondent purchased from the developer the whole shopping and office complex, excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory

relief. After the filing of the originating summons, the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed.

It was held by the Federal Court (Wan Suleiman, Seah and Mohamad Azmi FCJJ) that whether or not an agreement is an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the CLA, is to be gathered only from the four corners of the instrument itself, and the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision, and therefore, the appellant was not competent to maintain the action when it was filed.

The relevant passage of the judgment delivered by Seah FCJ is as follows at p 270:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes* v *Pump House Hotel Co Ltd* [1902] 2 KB 190). Having stated the preliminary and before we examine the terms of the document of assignment dated 18 February 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with

> the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

Since the respondents in the instant appeal were in the same position as the appellant in *Nouvau Mont Dor*, it is our view and it follows that the respondents are not competent to maintain the originating summons."

In the present appeal, under the loan agreement between MBSB and the respondents the Deed of Assignment is under Section 13 which states as follows:

"SECTION 13 SECURITIES

(a) DEED OF ASSIGNMENT

For better securing the repayment and payment of the Loan and interest thereon and all other monies and liabilities whatsoever as may now or at any time from time to time owing or payable by the Borrower(s) to MBSB in respect of the Loan and under the terms of this Agreement the Borrower(s) shall, simultaneously with the execution of this Agreement execute and deliver in favour of MBSB a deed of assignment duly consented by the Vendor/Developer assigning all the Borrower(s) rights title and interest and the full and entire benefits in the said Property and the Sale and Purchase Agreement to MBSB and that MBSB shall hold the Said Property as the absolute owner thereof to secure the Loan (hereinafter referred *to* as "the Deed of Assignment")."

From the above, it is clear to me that the Deed of Assignment is an absolute assignment and not purporting to be by way of a charge only. In the Deed of Assignment between the respondents and MBSB and consented to by the appellant it is stated as follows:

> "NOW IT IS HEREBY AGREED as follows:
>
> 1. In consideration of MBSB having agreed to grant the Assignor(s) the Loan upon the terms and conditions contained in the Loan Agreement the Assignor(s) as beneficial owner hereby ASSIGNS absolutely to MBSB all the Assignor's(s) right title and interest in and to the Said Property and the full and entire benefit under the Sale Agreement together with all the stipulations contained therein and all remedies for enforcing the same which MBSB hereby accepts and the Assignor(s) shall at all times hereafter save harmless and keep MBSB indemnified against all actions proceedings damages penalties costs claims and demands by reason or on account of the breach or non-observance of all or any of the stipulations on the part of the Assignor(s) to be performed and observed and contained in the Sale Agreement or otherwise howsoever by reason or on account of this Assignment."

Even though the assignment was absolute, the matter does not end there. It is not disputed that on 7.8.2001, MBSB had, by the Deed of Conditional and Partial Reassignment, reassigned the right to institute the present action to the respondents. This reassignment was served on the appellant on 15.8.2001. The appellant contended that the Reassignment Deed was of no effect because the respondents had given notice to terminate the S&P earlier, i.e. on 30.6.2001. The notice to terminate was

given before the Reassignment Deed was given to the respondents by MBSB. I am of the view that there is no merit in the appellant's contention. The absolute assignment, in my view, is only a prohibition to institute an action and is not applicable to notice to terminate. Notice to terminate is only a warning and it does not necessarily follow that a court action would be instituted. The crucial date is the date of filing the action in court which, in this case, was the filing of the Originating Summons which took place on 16.10.2001. This date was some two months after the Deed was served on the appellant. It is clear to me that when the respondents instituted the present action the absolute assignment had been lifted. For that reason, we see no merit in the appellant's contention on this issue.

As to the issue of whether the respondents have the right to terminate the S&P in view of a clause providing for damages for late delivery, the learned judge in his judgment stated as follows:

> " Section 56 of the Contract Act 1950 clearly gives the plaintiff a right of choice whether or not to terminate or continue with the agreement if the parties entering the relevant contract intends to make time of the essence.
>
> As the agreement became voidable, section 65 must be read together with section 56(1):

> 'When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit so far as may be, to the person from whom it was received.'
>
> The plaintiff elected to end the SPA through a letter/notice by the solicitor dated 30.6.2001 considering the defendant has failed to fulfil his obligations and terms of the agreement within the period specified in the SPA.
>
> Pursuant to Clause 27 of the SPA, the time period of 30 months to deliver vacant possession is of the essence of the agreement. As the defendant has failed to prove that there was any application to extend time from the Housing Ministry or discharge of responsibility on the defendant's part to deliver vacant possession within the time frame specified there are, therefore no matter or issue to be tried. As such, the plaintiff had the right to terminate the Sale and Purchase Agreement and are entitled to receive the return of monies paid by the Plaintiffs or paid on their behalf and any other miscellaneous expenses incurred. ... "

The learned judge was absolutely correct when he stated that the respondents had the choice of terminating the S&P or alternatively claiming for damages for late delivery. It is obvious that the respondents could not terminate the S&P and at the same time claim for damages for late delivery. The learned judge had allowed only the termination and not damages for late delivery. For that reason, we see no error in the judgment of the learned judge.

2. *The Delay was Beyond the Appellant's Control*

Learned counsel for the appellant submitted that Clause 22 of the S&P provides:

> "…. Vendor shall not be liable to the purchaser for any failure on its part to fulfil any term herein if such fulfillment is delayed, hindered or prevented by circumstances beyond the Vendor's control including …. delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said Land and other circumstances of whatever nature beyond the Vendor's control."

Clause 1(1) of the S&P defines "Appropriate Authorities" as follows:

> "…. any governmental, semi or quasi-governmental or statutory body or government-approved privatised corporation having jurisdiction in all matters relating to the development of the said Land …."

The appellant contended that the certificates of construction of works show that the appellant had completed the development of the said land on 27.4.1998 which was more than a year before the completion date and the date of delivery of vacant possession as stipulated in the S&P which was 15.3.1999. What remained to be completed was the remaining basic infrastructure, which include the telephone services and electrical infrastructure. The appellant further contended that for the electrical infrastructure it had to deal with TNB, a government approved privatised

corporation. There was a massive delay on the part of TNB to fulfil its obligations to complete the electrical infrastructure. The appellant stated that the cause of the delay was in selecting the contractor and mobilizing the site for cable works. TNB wanted to lay their cables only during the construction of houses despite the fact that TNB knew at that time that no houses were built by the appellant. Sometime in 1997, the appellant offered to undertake the electrical infrastructure works itself but this was rejected by TNB because TNB undertook to do the electrical infrastructure works by itself. However, some ten months later TNB changed its mind and requested the appellant to complete the electrical infrastructure works itself. The change of mind by TNB left the appellant with such a short period of time to complete the electrical infrastructure works, so much so it was almost impossible for the appellant to complete the works within the stipulated period. The appellant claimed that it completed the works in November 1999, except for the part to be completed by TNB which until March 2000 had yet to be completed.

The respondents contended that under the Fourth Schedule to the S&P, the obligations to complete the telephone and electrical infrastructure works were with the appellant and not with TNB and Maxis. The respondents further contended that the appellant was in control of the

circumstances pertaining to the sub-contracts with TNB and Maxis and as such could not rely on Clause 22 of the S&P as an excuse for the delay. The exclusion clause in Clause 22 which is stated as *"... or other circumstances of whatever nature beyond the Vendor's control"* should be restricted only to cover circumstances which is similar or in relation to other words used in Clause 22. Clause 22 specifically provided for such circumstances as "*force majeure", "acts of god", "civil commotion", "inclement weather", "acts of war", "strike loss", or "damage by fire", "flood", "tempest", "delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said land"*. The respondents went on to say that according to the *Ejusdem Generis* rule, if a general description follows specific words, the general description i.e. the words "*or other circumstances of whatever nature beyond the Vendor's control*" should be given a restricted meaning and should be in the same nature of the specific words. Applying the *Ejusdem Generis* rule and also on the proper construction of the contract, the delay and default of third party contractors or sub-contractors such as TNB or Maxis is not covered by Clause 22.

The learned trial judge in his judgment made the following observation:

> "The Defendant failed to prove that the third parties' delay was beyond the control or care of the Defendant. Therefore the Defendant did not have the protection under Clause 22 of the said Agreement. Additionally, Clause 13 of the said Agreement stipulates that the Defendant was under an obligation to ensure that the basic infrastructure works are ready as stated in the Fourth Schedule of the said Agreement.
>
> Clause 13 of the SPA reads:
>
> > The vendor shall, at its own costs and expense, construct or cause to be constructed the basic infrastructure serving the development, namely roads, drains, culverts, electricity installations and water mains in accordance with the requirements and standards of the Appropriate Authority and more specifically set out in the Fourth Schedule hereto."

Going through the evidence and as pleaded by the appellant itself, the delay was caused by laying the electrical and telephone cable late. I agree with the conclusion of the learned trial judge that the delay as pleaded is not a delay as stipulated by Clause 22 of the S&P. The delay in the present appeal was by the appellant's sub-contractors who were under the control of the appellant. The S&P clearly provides for a completion date and I believe this is also true in the sub-contracts with TNB and Maxis. The appellant could terminate the cob-contracts when it became obvious that the sub-contractors could not complete the works within the stipulated time. As it was the appellant did nothing and now uses Clause 22 of the S&P as an excuse for the delay.

For the reasons stated above, I agree with the learned trial judge that the delay was not a delay within the exclusion clause 22 of the S&P.

3. *Waiver and/or estoppel*

The last issue raised by the appellant in this appeal was waiver and/or estoppel. The appellant submitted that under the S&P, delivery of vacant possession on the land was to have been on or before 15.3.1999 and time was made the essence. The appellant submitted that the respondents elected to keep silent when the delivery of vacant possession was not effected on 15.3.1999. On the other hand, the respondents continued to pay the quit rent for the years 1999 and 2000 which were their obligations under the S&P. It was further submitted by the appellant that the respondents waited for 2 years and 3 months before issuing the purported notice of termination which was dated 30.6.2001. The appellant contended that the act of the respondents constituted a waiver and/or gives rise to an estoppel and cited *Cheah Koon Tee* v. *Crimson Development Sdn Bhd* [1999] MLJU 108; *Sim Chio Huat* v. *Wong Ted Fui* [1983] 1 MLJ 151 and *Charles Richards Ltd.* v. *Oppenheim* [1950] 1 All ER 420.

In reply, the respondents submitted that they had never indicated to the appellant that it was acceptable to the respondents that the appellant

fulfilled its promise of the delivery of vacant possession at a later date other than that stipulated by the S&P. Silence and time having passed by themselves are not evidence of a waiver. The respondents then cited *Sakinas Sdn Bhd* v. *Siew Yik Hau & Anor* [2002] 3 CLJ 275 and *Tan Kim Yew* v. *Sentul Raya Sdn Bhd* [2004] 3 CLJ 310. The respondents further submitted that the relevant period for the court to look into the conduct of both parties was between the completion date (15.3.1999) to the termination date (30.6.2001). During this period the respondents did not take any step which could even remotely be said to amount to a waiver save as to pay the quit rent (a statutory payment) which the appellant might have refused to pay whereby opening the respondents to sanctions by way of fines, etc. For that reason, the respondents had no choice but to make those payments. Anyway, the respondents did not play an active role in the payment of quit rent because the quit rent was paid by the appellant on behalf of the respondents to the local authorities as it is based on the master title which has yet to be sub-divided. Further, it was MBSB who was charged by the appellant for the payment of the quit rent. The appellant did not adduce any other evidence which could be constituted as a waiver or estoppel on the part of the respondents.

The respondents did not dispute the fact that they did nothing when the date for delivery of vacant possession came into being. The appellant termed this as silent on the part of the respondents. Silence by itself could not be interpreted as a waiver. It does not mean anything unless there is additional factor which together with the silence could be interpreted or inferred as a waiver and/or estoppel as seen in ***Sim Chio Huat*** v. ***Wong Ted Fui*** *(supra)* where in allowing the time to pass and keeping silent to the repudiation and also the fact that the respondent had asked the appellant to do extra works during that period would as a whole tantamount to a waiver and/or estoppel. In the present appeal, except for the silence, the respondents did nothing at all. As such, I am of the view that there is no act on the part of the respondents which could be constituted as a waiver or estoppel.

The appellant also raised the issue of whether the termination by the respondents was a rescission or repudiation. The appellant submitted that when the learned judge relied on s. 65 of the Contracts Act 1950, the learned judge erroneously treated the S&P as having been rescinded instead of being terminated. As we understand, the official judgment of the learned trial judge was in Bahasa Malaysia while the English version

was only a translation. In his judgment the learned judge stated as follows:

> *" Pihak Plaintif telah membuat pilihan untuk menamatkan PJB melalui surat/notis melalui peguamcaranya bertarikh 30.6.2001 memandangkan pihak Defendan telah gagal memenuhi obligasi serta terma perjanjian dalam tempoh masa yang ditentukan dalam PJB.*
>
> *Menurut fasal 27 PJB tempoh masa 30 bulan bagi menyerahkan milikan kosong merupakan intipati perjanjian. Memandangkan Defendan gagal membuktikan bahawa terdapat sebarang permohonan untuk perlanjutan masa dari Kementerian Perumahan atau pelepasan tanggungjawab tersebut di pihak Defendan untuk menyerahkan milikan kosong dalam masa yang telah ditetapkan maka tiada perkara atau isu yang harus dibicarakan. Justru itu Plaintif adalah berhak untuk menamatkan Perjanjian Jual Beli tersebut dan berhak juga mendapatkan kembali wang-wang yang dibayar olehnya atau bagi pihaknya serta lain-lain perbelanjaan hangus. Oleh yang demikian Mahkamah membenarkan permohonan pengisytiharan Plalintif:*
>
> *(i) Telah menamatkan PJB bertarikh 15.9.1996 pada 30.6.2001.*
>
> *(ii) Defendan hendaklalh kembalikan wang berjumlah RM217,011.50 yang telah dibayar Plaintif kepada Defendan..*
>
> *(iii) Defendan hendaklah kembalikan wang yang telah dibayar oleh Malaysia Building Society Berhad kepada Defendan bagi pihak Plaintif berjumlah RM8,111.00 bersama-sama faedah.*
>
> *(iv) Defendan memulangkan balik semua kos guaman yang telah dibayar bagi menyempurnakan PJB berjumlah RM3,818.56.*

(v) Faedah ke atas dua dan tiga dari tarikh pemfailan tindakan ini kepada tarikh bayaran."

From the above, one can see that the term used by the learned judge was "*menamatkan*" which means terminate. He did not say whether the termination was a rescission or repudiation. In the present appeal the termination by the respondents was because the appellant was in breach of the S&P for not being able to deliver vacant possession of the subject property within the time stipulated in the S&P. I agree with the submission of the respondents' counsel that when a termination is as a result of a breach of one of the parties, the innocent party should be placed in the same position as it was before the agreement. In the present appeal the respondents are the innocent party and they have claimed damages in that whatever money that have been paid by them and by MBSB should be refunded to the respondents as well as to MBSB. In the case of the money paid by MBSB the appellant have to pay the interest charged by MBSB on the amount advanced by MBSB. The appellant did not dispute the amount already paid by the respondents and MBSB to them.

I am of the view that the learned judge came to the correct decision and made the right order as stated above. The appeal by the appellant is hereby dismissed with costs. The order of the learned judge is hereby

affirmed. The deposit is to be paid to the respondents to the account of taxed costs.

My learned brother, Tengku Baharudin Shah Tengku Mahmud, J.C.A. has seen this judgment in draft and has indicated his agreement with it.

Dated: 17 September 2007

(Datuk Haji Mokhtar bin Haji Sidin)
Judge,
Court of Appeal, Malaysia

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