

A

**DALAM MAHKAMAH RAYUAN MALAYSIA
BIDANGKUASA RAYUAN
RAYUAN SIVIL NO. W-02-683-2006**

ANTARA

WONG YEW KWAN

(NO. K/P : 490109-10-5741)

... PERAYU

B

DAN

1. WONG YU KE

(NO. K/P : 500822-10-5161)

2. WONG YEW KIT

(NO. K/P: 521101-14-5019)

**... RESPONDEN-
RESPONDEN**

C

**(Dalam perkara Guaman Sivil No. S4-22-1352-2004 dalam
Mahkamah Tinggi Malaya di Kuala Lumpur**

ANTARA

1. WONG YU KE

(NO. K/P : 500822-10-5161)

2. WONG YEW KIT

(NO. K/P: 521101-14-5019)

**... PLAINTIF-
PLAINTIF**

D

DAN

WONG YEW KWAN

(NO. K/P : 490109-10-5741)

... DEFENDAN

E

**Corum : Gopal Sri Ram Ram, JCA
Zaleha Zahari, JCA
Zainun Ali, JCA**

JUDGMENT OF ZALEHA ZAHARI, JCA

A The issue in this appeal is whether the High Court Judge was right on the facts and in the circumstances of this case in striking out the Defendant's (Appellant in this appeal) Defence and Counterclaim; thereafter, in entering judgment in favour of the Plaintiffs (Respondents in this appeal).

B BACKGROUND

 The Appellant and Respondents are brothers. The land in issue is an undivided half ($\frac{1}{2}$) share of land held under Certificate of Title No. 347, Section 56, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("the said land") together with the exclusive use and possession of the shop/flat on the Ground and 1st Floor. The said land was originally purchased jointly by their father, Wong Hong, and their mother, Tang Chua Ngan (f) (since deceased) from Suet Choo Housing Development Sdn. Bhd. "the Company") vide Sale and Purchase Agreement dated 12.8.1970 ("the Agreement") for the sum of RM55,250.00. The Recital of the Agreement states that the Company had erected on the said land a four storey building ("the said building") and the Company has agreed to sell to Wong Hong and Tang Chua Ngan half ($\frac{1}{2}$) share of the said land together with the exclusive use and possession of the shop/flat on the Ground and 1st Floor.

 The Respondents' case was that they were the registered

A owners of the said land at the material date. By letter dated 31.7.2004 they gave the Appellant notice to deliver vacant possession of the said land. When the Appellant failed to do so the Respondents commenced proceedings for a declaratory order that the Appellant was a trespasser, and also sought for an order of vacant possession of the said land as well as
B consequential orders.

It is in evidence that the owners of each floor of the said building had executed a "Common Agreement" by which agreement the separate ownership of each floor was recognized. Each floor owner was responsible for their own
C Property. Clause 8 of the Common Agreement states that the Common Agreement was binding upon their successors-in-title. The owner of the 2nd Floor (Ng Yee Wah) and owner of the 3rd Floor (Bong Chie), had each filed an affidavit stating that they have had no dealings with the Appellant, and had not authorized the Appellant to enter the said land. Both of these
D two owners had also affirmed that they had given the Respondents full authority to commence the suit against the Appellant which is the subject matter of this suit under appeal.

The Appellant in paragraphs 2 and 3 of his Statement of
E Defence and Counterclaim claimed to be entitled to a quarter ($\frac{1}{4}$) share of the said land. In paragraph 4 the Appellant alleged that he had acquired a "*licence coupled with equity*", then

A in paragraph 5, to an “*irrevocable licence*”. The Appellant then contended that the transfer of the said land to the Respondents was tainted by fraud, but did not particularize the same.

On 5.1.2006 the Respondents filed a Summons-in-Chambers to strike out the Appellant’s Statement of Defence and Counter-Claim pursuant to O. 18 r 19(1) (b) and/or (d) of the Rules of High Court 1980 (“the Rules”).

In opposing the Respondents’ striking out application of his Defence and Counterclaim, the Appellant averred that he had been in occupation of the said land together with his father since 1.4.1971 from which premises, he, together with his father, carried on business as partners under the name and style of “Hong Kee Trading” and that he was still carrying on business there under the same name. The Appellant averred to having contributed towards the purchase price and that his father had promised to transfer the said land to him. The Appellant also averred to having incurred costs in renovating the premises such that the business could be carried more effectively. By reason thereof the Appellant contended that he had acquired an irrevocable license coupled with interest to remain in occupation of the said land. According to the Appellant, the issue whether or not he holds an irrevocable license coupled with interest can only be determined at trial by way of oral testimony of witnesses.

A It was also the Appellant's case that when his mother died on 7.7.1995 her undivided half share of the said land should have been distributed in accordance with section 6(1)(e) of the Distribution Act 1958. His father, Wong Hong, would be entitled to one third of his mother's half share, whilst the balance two-thirds of her half share should have been divided equally
B between her children, which should have included him. The Appellant averred that the transfer of his father's share of the said land into the Respondents' name was "*done under mysterious situation*" without his knowledge. Likewise, the transfer of his mother's share of the said land to the Respondents name was also done without the Appellant's
C knowledge and/or consent.

 At the hearing of the striking out application the Appellant raised four preliminary objections. The High Court Judge dismissed them all as being devoid of merit. On the contention of the Respondents having no *locus standi* to commence
D proceedings by reason of the other co-owners of the said land not being cited as Plaintiffs, the Judge ruled that this issue should have been raised in the defence and not by way of an affidavit in opposition to the striking out application. The Judge held that it was not open for the Appellant to improve his defence
E by way of an affidavit. In any event she held that this was a non-issue for the following reasons: the other registered co-owners of the said land had given their consent to the Respondents to

A commence proceedings against the Appellant, and that it was unnecessary for the other co-owners to be joined as a parties as it would increase costs. In any event no cause or matter should be defeated by reason of non-joinder of any party.

I agree with her rulings. This suit was filed in 2004. This
B issue of non-joinder of the other co-owners was only raised subsequent to the Respondents filing the application to strike out. The Judge was clearly right in ruling that an affidavit cannot improve the Defence and Counterclaim. She was also right in ruling that there is no requirement for the other co-owners to be joined as co-Plaintiffs and this issue, a non-issue,
C as the other registered co-owners of the said land had given their consent to the Respondents to commence these proceedings against the Appellant. On the allegation of delay in filing the striking out application, (i.e. fourteen months after the close of pleadings), the Judge was also right in ruling this issue to be devoid of merit as an application under 0.18
D r.19(1) of the Rules could be made at any stage of the proceedings.

The High Court Judge also rejected the Appellant's contention that the declaratory order sought by the
E Respondents contravened section 41 of the Specific Relief Act 1950. She ruled that there was nothing in that provision prohibiting a Court from exercising its discretion of making a

- A declaratory order so long as the declaratory order sought is for a purpose and not at the instance of a busy body [*Datuk Syed Kechik Bin Syed I Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101]. The Court's jurisdiction to make declaratory order is only subject to its own discretion. The Respondents, as the registered owners of the said land, clearly has an interest in the property in issue and the High Court Judge was clearly right in rejecting this preliminary objection.

The Judge then considered the Respondents' striking out application on its merits. She ruled that the Appellant's Statement of Defence and Counterclaim did not disclose a reasonable defence, nor a reasonable cause of action. The Respondents' striking out application was allowed. The Respondents had applied for judgment to be entered against the Appellant by prayer (iii) (a) to (e) after the Defence is struck out. The Judge then entered final judgment against the Appellant in terms of the prayers set out in the Statement of Claim.

D

The Appellant's Counsel had in his submission argued that an application to strike out a Statement of Defence and Counter-Claim and to enter judgment cannot be made in one and the same application as different considerations apply. He was of the view the application should have been dismissed as the application was seeking for two separate and distinct mutually exclusively reliefs. This argument is clearly misconceived. It is

E

A trite law that a Court can enter judgment after striking out of Defence [See *Lee Yoke San v Tong Lee Hwan & Anor* [1978] 2 MLJ 112].

Order 18 rule 7(1) of the Rules requires a party to state the pleadings in the form of skeletal statement of facts sufficient to identify the matters complained of to enable one to establish one's case at the trial based on what is pleaded. To satisfy the rule on pleadings, the Appellant was accordingly required to plead "material facts" necessary for his Defence and Counterclaim. On the issue of fraud, O.18 r.8 (1) of the Rules requires fraud to be specifically pleaded. There is good reason for doing so. It is so as not to take the other party by surprise. In *M.R in Associated Leisure Ltd. & Ors v Associated Newspapers Ltd* [1970] 2QB, 450 Lord Denning said, '*it is the duty of the Counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it*'. On the non-particularization of fraud, the Federal Court in *Tan Chwee Geok v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188, 191 ruled that "*Before a plea of fraud is put on record, it is the duty of Counsel to insist on being fully instructed in the matter. Such a plea should never be pleaded on flimsy material*".

The non-particularization of the allegation of fraud by the Appellant in this case was clearly fatal. The admission by the Appellant of the discovery of fraud being "*recent*" and

- A “*investigation is still on going*” is against the Rules and not in accord with the principles which has been firmly established. Paragraphs 1 and 2 as pleaded in the Statement of Defence and Counter-Claim clearly were clearly insufficient on the issue of fraud.
- B The principles upon which the Court acts in exercising its power under any of the four limbs of 0.18 r.19(1) RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable...”
- C [See *Bandar Builder Sdn Bhd. & 2 ors v United Malayan Banking Corporation Bhd* (1993) 4 CLJ 7 Supreme Court].

Based on the facts and circumstances of this case the Judge was right in finding that the Statement of Defence and Counterclaim of the Appellant discloses no reasonable defence, and in further finding that there is no reasonable cause of action against the Respondents. This clearly is a plain and obvious case for the Court to exercise its power for striking out of the Defence and Counterclaim, as well for judgment to be entered against the Appellant. The High Court was fully justified in arriving at the conclusions which she did.

The appeal is dismissed with costs. The deposit to

A Respondents to account of taxed costs.

ZALEHA ZAHARI
Judge
Court of Appeal
Malaysia

B

Dated : 24 December 2008

Note:

For the Appellant Dato' Manpal Singh
(Adrian Oswald with him)
Tetuan Manjit Singh Sachdev,
Mohamad Radzi & Partners
Advocates & Solicitors
No. 1, Tingkat 11,
Wisma Havela Thakardas
Jalan Tiong Nam
Off Jalan Raja Laut
50350 KUALA LUMPUR

C

For the Respondent En. John Clark
(En. Alvin Lai with him)
Tetuan Sidek Teoh Wong & Dennis
Advocates & Solicitors
Level 32 Menara TH Perdana
1001, Jalan Sultan Ismail
50200 KUALA LUMPUR

D

E