

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. 02 – 2 – TAHUN 2007 (J)

ANTARA

**JOHOR COASTAL DEVELOPMENT SDN. BHD. ... PERAYU
(NO. SYARIKAT: 206967-M)**

DAN

**CONSTRAJAYA SDN. BHD. ... RESPONDEN
(NO. SYARIKAT: 404617-K)**

(Dalam perkara mengenai Rayuan Sivill No. J-02-742-2001
dalam Mahkamah Rayuan Malaysia di Putrajaya

Antara

Johor Coastal Development Sdn. Bhd. ... Perayu
(No. Syarikat: 206967-M)

Dan

Constrajaya Sdn. Bhd. ... Responden)
(No. Syarikat: 404617-K)

Coram: Alauddin Bin Dato' Mohd Sheriff, CJM

Arifin Bin Zakaria, FCJ

Hashim Bin Dato' Hj. Yusoff, FCJ

JUDGMENT OF
JUSTICE HASHIM BIN DATO' HJ. YUSOFF

Factual Background

1. The Appellant (Defendant in the High Court) entered into two Sale and Purchase Agreements both dated 13/03/1997 (“the SPA”) containing identical provisions, with the Respondent (Plaintiff in the High Court) who agreed to purchase lots 7 and 14 of the Johor Bahru Waterfront City, from the Appellant and undertook further obligation to construct buildings on them in accordance with the plans prepared and provided by the Appellant. The purchase price for the land was to be paid by instalments. The Appellant was developing a mixed development project in Johor Bahru called the JB Waterfront City. The Respondent was to commence construction of the units for sale to end-purchasers within 3 months according to the plans set out in the Agreements. The Respondent agreed to complete the units within 3 years from the date of issuance of the document of title.

2. The purchase price for the land was to be paid in instalments in the manner as set out in the Second Schedule to the said SPA. The Respondent made the initial payment of 12% and then made subsequent payments amounting to about 50% of the purchase price under both agreements. After that the Respondent defaulted in making payment. The Appellant held the Respondent responsible for breach of the agreements and forfeited all the monies paid to them. The Respondent then commenced proceedings by originating summons and sought to recover all the money it had paid to the Appellant.

Findings of the High Court and the Court of Appeal

3. At the High Court the learned Judicial Commissioner ordered the Appellant to refund all the monies received under the SPA to the Respondent as the Appellant failed to furnish proof of actual damage suffered. On appeal however the Court of Appeal allowed the appeal in part by holding that the Appellant was entitled to forfeit 12% of the purchase price as a “true deposit” paid under the SPA but must refund the balance of monies received exceeding the 12% as the Appellant had failed to strictly prove damage under Section 75 of the Contracts Act 1950 (“the Act”).

Questions of Law

4. On 9 January 2007, the Appellant obtained leave from this Court to appeal against the decision of the Court of Appeal on the following questions:-

- (i) Whether that part of the decision in **Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817** which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in Section 75 of the Contracts Act 1950 “*whether or not actual damages or loss is proved to have been caused thereby*”, is correct?
- (ii) Whether or not parties entering into a contract are entitled to contract out of the provisions of Section 75 of the Contracts Act 1950?

The Appeal

5. Learned counsel for the Appellant, in his submission referred to clauses 8.1 and 8.2 of the SPA which read as follows:-

“Section 8.1 Default of the Purchaser

If the Purchaser:-

- (a) fails for any reason to pay any instalment payable (other than the First Payment) in accordance with the Second Schedule of this Agreement and/or any interest payable thereon; and/or*
- (b) ...*
- (c) ...*
- (d) ...*
- (e) ...*
- (f) ...*

then the Vendor may give notice in writing to the Purchaser specifying the relevant default and requiring the Purchaser to remedy the default within fourteen (14) days from the date of the notice. If the Purchaser fails to remedy the relevant default within the period specified in the said notice, then without prejudice to any other rights or remedies available to the Vendor under this Agreement the Vendor shall be entitled at the cost and expense of the Purchaser and at the Vendor’s sole discretion to the following remedies:-

- (A) ...*
- (B) to terminate this Agreement in which case Section 8.2 hereof shall apply.”*

“Section 8.2 Consequences of termination of Agreement

Upon the termination of this Agreement under Section 8.1 (B) 6 hereof, and without prejudice to any other remedies which the Vendor is entitled under this Agreement:-

- (a) ...*
- (b) all instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement, in which event an amount equal to ten per centum (10%) of the Purchase Price shall be forfeited to the Vendor absolutely, and all instalments previously paid by the Purchaser to the Vendor including the First Payment after deducting the amount forfeited shall be returned to the Purchaser, without interest.”*

6. It was therefore submitted that the burden was on the innocent party to prove the loss. In the instant appeal it was argued that no evidence was led by the Respondent (Plaintiff) to show that it had actually suffered any loss. The Appellant’s solicitor’s letter dated 19 April 2000 (at page 289 of the Appeal Record) addressed to the Respondent, merely stated the termination of

the SPA and inter alia, the forfeiture of all instalments previously paid by the Respondent (Plaintiff) totalling RM2,970,745.65.

7. Reference was made to the case of *Linggi Plantations Ltd. v Jagatheesan [1972] 1 MLJ 78*, where the questions for determination in the proceedings was whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser, though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract. On appeal to the Privy Council, it was held:-

“(1) the contract meant, unambiguously, that in the event of a failure by the purchaser to complete and notice to terminate being given, the vendor was at liberty to forfeit the deposit and to claim for any damage which he had suffered over and above the amount of the deposit, after giving credit for the amount of the deposit;

(2) section 65 of the Ordinance was not applicable to the circumstances of the existing case. The point raised was not one which could be sustained in the

light of the authorities and the language of the section;

- (3) *once it was decided that the construction of the contract was such that the sum of \$377,500 was paid as a true deposit and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, section 75 of the Ordinance could have no application when the contract was properly terminated, and the deposit was forfeited whether or not damage was proved. There was no difference in this context between the expression “deposit” and the expression “earnest money”. A reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.”*

8. It was further submitted that according to the schedule of payment (the Second Schedule of the SPA) the first payment, in point of time, i.e. immediately upon the signing of the SPA on 13/03/1997, refers to the 12%. The Respondent also had paid the second progress payment and the third progress payment of 20% each to the Appellant. However the Respondent only made part payment of the fourth progress payment to the

Appellant in the sum of RM1,000,000.00 despite numerous demand letters from the Appellant to the Respondent. In total, the Respondent paid RM2,866,800.00 for the first Agreement and RM6,131,600.00 for the second Agreement, making a total of RM8,998,400.00 and not RM9,018,400 as stated in the High Court Grounds of Judgment at Appeal Record 2 page 33.

9. Learned counsel for the Respondent however submitted that under Section 75 of the Contracts Act, the payments made is deemed a penalty and therefore the innocent party must justify by proving its loss. Moreover in the instant appeal, the Appellant had forfeited all the payments made by the Respondent and at the same time retained the property as well. He submitted that such a situation would amount to unjust enrichment because the object of damages is merely compensation and not punishment.

Findings

10. Section 75 of the Contracts Act 1950 provides:-

“Compensation for breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

11. Several illustrations to Section 75 are given but I feel that illustration (f) is relevant for the purpose of the present appeal i.e.:-

“(f) A undertakes to repay B a loan of \$1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.”

12. In the case of **Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817**, “both the appellant and

respondent in the case were medical practitioners. The appellant entered into an agreement in writing ('the agreement') with the respondent whereby the respondent sold his clinic to the appellant for a total purchase price of RM120,000. Pursuant to the agreement, the appellant paid to the respondent RM12,000 on signing the agreement, and thereafter paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, at the stage when the appellant had paid up to a total sum of RM96,000 towards the total purchase price, he refused to go on paying the remaining six monthly instalments. The respondent sought to forfeit the RM96,000 by relying on a clause in the agreement which in effect, provided that if the appellant defaulted, all moneys paid to date of such breach would be forfeited absolutely to the respondent as agreed liquidated damages, and the agreement would be terminated. The respondent successfully obtained a declaration from the High Court that the clause was valid and enforceable. The appellant appealed."

13. The Federal Court in that case held:-

- “(1) In Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, ‘whether or not actual damage or loss is proved to have been caused thereby’ (‘the words in question’).*
- (2) However, the words in question must be given a restricted construction. Hence, despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in Hadley v Baxendale (1854) 8 Exch 341; [1843-60] All ER Rep 461. Any failure to prove such damages will result in the refusal of the court to award such damages.*
- (3) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court’s good sense and fair play. In any*

event, the damages awarded must not exceed the sum so named in the contractual provision.

- (4) *The instant case falls into the category of cases where damages could be proved by settled rules. The respondent could have proved the actual loss of, for example, use of the medical equipment in the clinic, but failed to do so. Therefore, the court could not quantify any award of damages to him.*
- (5) *In any event, apart from the real loss that had not been proved, the respondent was entitled to forfeit a reasonable amount of deposit. The sum of RM12,000 was not too large to prevent it from being fully forfeitable. Accordingly, the respondent had to refund the sum of RM96,000 less the deposit to the appellant.”*

14. In delivering the judgment of the Court in that case, Peh Swee Chin FCJ referred to the agreement whereby the vendor had agreed to sell to the purchaser the said premises free of all encumbrances for a total sum of RM120,000. His Lordship then referred to the relevant clause 15(b) in the said agreement which reads:-

“In the event the purchaser shall default in his obligations herein all moneys paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and therefore this agreement shall be declared null and void. ...”

15. Later at page 823, his Lordship opined on Section 75 of the Contract Ordinance (which is now the Contracts Act 1950) as follows:-

“We have long known the object for which the section in question was enacted first in India and later here in our country. Thomson J (as he then was) in Maniam v The State of Perak [1957] MLJ 75, commenting on arguments advanced before him as to whether a certain sum was to be regarded either as a penalty or as liquidated damages, said [at p 76]:

In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as s 74 of the Indian Contract Act reads as follows:

‘When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract

contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

*As is said in Pollock and Mulla on the Indian Contract Act (7th Ed) at p 410, 'This section boldly cuts the most troublesome knot in the common law doctrine of damages'. In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179.*

It is obvious that any submission as to whether a certain clause in a contract is a penalty or liquidated damages is an exercise in futility. Clause 15(b) of the agreement before us is therefore unenforceable and is to be regarded as a penalty, void in equity for being unconscionable."

16. Reference was also made in that case to the Privy Council case of ***Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179** where Lord Atkin said in connection with Section 74 of the

Indian Contract Act 1872 (corresponding to Section 75 of our Act), held:-

“The effect of s 74 of the Contract Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000, whether the penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.”

17. The gist of the cases referred by this Court in the **Selva Kumar** case is that Section 75 of the Contracts Act 1950 must be given a restricted construction. In other words, a Plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or reasonable compensation in accordance with the settled principles in **Hadley v Baxendale (1854) 8 Exch 341.**

18. Coming back to the present appeal, learned counsel for the Appellant submitted that the contractor had abandoned the project 3 years later. Although proof of loss and damages could be given it would be a very lengthy process. It was to avoid this lengthy process that the parties could agree on a stipulated sum in the event of a breach. It could not be the case

that the innocent party would be the one to have to prove the loss.

19. I am of the view that Section 8.2(b) of the SPA is very clear in stating that *“all instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement. ...”*
20. In the instant appeal, it is the Respondent which was the defaulting party when it stopped making further payments of instalments in accordance with the schedule of payment in the SPA. As a result, the Appellant forfeited all the monies paid to it.
21. There is also, clause 16.2 of the SPA which provides:-

“Section 16.2 Reasonable Compensation

Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute

reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.”

22. The Court of Appeal in its judgment in this case at [2005] 2 CLJ 914 at page 926 said:-

“... if there is any conflict or contradiction between cl. 8.2 and 16.2, then there arises an ambiguity as to what the joint effect of these two clauses is. Since it is the appellant who relies on cl. 16.2 to justify the forfeiture, that clause should be read contra proferentum the appellant and the resulting ambiguity between it and cl. 8.2 must be resolved in the respondent’s favour. What that means is that it is not open for the appellant to keep all the monies.”

23. It is also trite law that it is up to a Plaintiff to prove his loss. In the instant appeal it was the Respondent which was the Plaintiff in the High Court that sought to claim back the moneys which it had paid to the Respondent after the later terminated the SPA. Therefore I am of the view that the burden lies on the Plaintiff (Respondent) to prove its loss, not on the Appellant which is the innocent party.

24. However even if I am wrong as to who is the actual Plaintiff, it was held by this Court in **Selva Kumar's** case (supra) that where the Court finds it difficult to assess damages for the actual damages as there is no known measure of damages employable, the Court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the Court's good sense and fair play.
25. In the instant appeal there was no evidence tendered to show what loss had been suffered. What we have is that the Respondent had paid 12% as the initial payment and thereafter subsequent payments amounting to about 50% of the purchase price under both agreements. It must be noted that this was not just a sale and purchase of property simpliciter. As stated earlier, the Appellant was developing a mixed development project and the Respondent was to do the construction and complete it within 3 years after the SPA was signed. The Appellant still retains the property even after the termination of the SPA due to the Respondent's default.

26. I would therefore agree with the Court of Appeal's reasoning that the Appellant could keep the 'First Payment' or 12% of the purchase price pursuant to clause 8.2(b) of the SPA. And I would add that the subsequent payment of instalments up to the time of default would also be awarded to the Appellant as being an amount that is reasonable in view of the nature of the project and its abandonment by the Respondent 3 years after the SPA was signed.
27. My finding is also based on illustration (f) to Section 75 of the Act. However in this case for lot No. 7, the Respondent had agreed to purchase the property from the Appellant for RM4,590,000.00. 12% of the purchase price (RM550,800.00) was paid immediately upon signing of the SPA. Out of the balance of the purchase price (RM4,039,200.00) RM918,000.00 was to be the First Payment and the remaining balance to be paid by 5 instalments as provided in the Second Schedule of the SPA (similar to that of the SPA for lot No. 14).
28. For lot No. 14, the Respondent had agreed to purchase the property from the Appellant for RM10,830,000.00. 12% of the purchase price (RM1,299,600.00) was paid immediately upon

signing the SPA. Out of the balance of the purchase price (RM9,530,400.00) the same manner of payment was adopted i.e. by 5 instalments as provided in the Second Schedule of the SPA as follows:-

“SECOND SCHEDULE

(which is to be taken read and construed as an integral part of this Agreement)

SCHEDULE OF PAYMENT

NO.	TIME FOR PAYMENT	PERCENTAGE
1.	<i>Immediately upon the signing of this Agreement</i>	12%
2.	<i>Within three (3) months from the date of this Agreement</i>	20% <i>(First Payment)</i>
3.	<i>Within six (6) months from the date of this Agreement.</i>	20%
4.	<i>Within nine (9) months from the date of this Agreement</i>	20%
5.	<i>Upon issuance of document of title</i>	20%
6.	<i>Upon completion of Infrastructure Works</i>	8%

Items 5 and 6 need not be in the above order.

29. While illustration (f) to Section 75 of the Act states:-

“... in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.”

30. Section 8.2(b) of the SPA provides that *“all instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest therein paid as at the date of termination shall be forfeited to the Vendor absolutely ...”*

31. It is also trite law that the Courts have to give effect to the provision of the Statute. In the instant appeal the parties had agreed to a stipulated sum and the manner of payment at fixed instalments. All these payments could be easily calculated. And the parties have specifically agreed under Section 8.2(b) of the SPA, that in the event of a breach, all the monies already paid shall be forfeited. So clearly a sum has been named as the amount to be paid in case of such breach and the Vendor (the Appellant) is therefore entitled to receive from the Purchaser (Respondent) who has broken the contract

reasonable compensation not exceeding the amount so named, whether or not actual damage or loss is proved to have been caused thereby. Under clause 16.2 of the SPA, the parties had agreed that the sums stipulated in the SPA to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and had also waived any objection thereafter that those sums would be otherwise than fair or reasonable compensation. This stipulation I feel, is not contrary to Section 75 of the Act.

32. For the above reasons, I would therefore answer Question (i) in the negative and Question (ii) in the positive. The appeal is therefore allowed with costs. The order of the Court of Appeal is set aside and the deposit is to be returned to the Appellant towards account of taxed costs.

Dated this 12th June, 2009.

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge
Federal Court of Malaysia
Putrajaya

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Cases Referred To:

- (1) Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817;
- (2) Linggi Plantations Ltd. v Jagatheesan [1972] 1 MLJ 78;
- (3) Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC 179;
- (4) Hadley v Baxendale (1854) 8 Exch 341.