



## **JUDGMENT OF ARIFIN BIN ZAKARIA, FCJ**

This is an application for leave by the Applicant (Defendant in the High Court and Appellant in the Court of Appeal) to appeal against the decision of the Court of Appeal given on 2.11.2007 which by a majority dismissed the Applicant's appeal. Initially the Applicant proposed 4 questions for consideration and determination of this Court which read as follows –

1. Whether Order 14A of the *Rules of the High Court, 1980* procedure may be invoked when no question of law framed or a specific question on the construction forwarded to the Court for consideration?;
2. Whether Order 14A of the *Rules of the High Court, 1980* procedure may be invoked before pleadings are closed?;
3. Whether Order 14A of the *Rules of the High Court, 1980* procedure may be invoked when there is a serious dispute as to the material facts by the parties, or that the Court, upon scrutinizing the pleadings, concludes that the material facts are in dispute?; and

4. Whether in an Order 14A of the *Rules of the High Court*, 1980 procedure, the Court may exercise its jurisdiction to make a finding by resolving the material disputed facts by embarking on an expedition to evaluate conflicting affidavit evidence?”

In the course of his submission learned counsel for the Appellant put in further questions which are as follows –

- “5. Whether the summary procedure of Order 14A of the *Rules of the High Court*, 1980 is suitable and/or appropriate in the circumstances of this appeal having regard to:
  - (a) the existence of serious disputes in respect of the material facts concerning the date when vacant possession of the subject land had been delivered to the Applicant/Defendant;
  - (b) the absence of a Defence and thereby prior to the close of pleadings and before the pleaded position of all the parties had become known; and

- (c) the lack of an application for or the ordering of specified and identified questions of law for determination by the Court.
6. Whether Order 14A is a suitable procedure for determination of mixed questions of fact and law in the guise of construction of a document.
  7. Whether the date when vacant possession of the subject land was delivered to the Plaintiff can be determined by proceedings under Order 14A.
  8. Whether the Plaintiff by:
    - (a) failing to communicate in writing to the Defendant timeously of its acceptance of the Defendant's alleged repudiation of the Contract when the Defendant failed to pay the balance purchase price of RM25 million to the Plaintiff on the completion date of 21<sup>st</sup> May 2006 (as contended by the Plaintiff);
    - (b) not accepting such repudiation by failing to forfeit the deposit of RM3,350,000.00; and

- (c) accepting a further sum of RM5,150,000.00 by way of bank draft from the Defendant on 22<sup>nd</sup> August 2006 (which was 3 months after the completion date as contended by the Plaintiff);

The Plaintiff had affirmed the continued existence of the Contract.

- 9. Further or alternatively to Issue 8 above, whether by the conduct described therein, the Plaintiff had signified its acquiescence in the continuation of the Contract within the meaning of Section 40 of the *Contracts Act, 1950*.
- 10. Further or alternatively to Issues 8 and 9 above, whether the Plaintiff is estopped from terminating the Contract by reason of its conduct referred to in Issue 8.
- 11. Whether the decision of the High Court, which was upheld by the Court of Appeal, has the effect of conferring an unjust enrichment to the Plaintiff in that it would enjoy the following benefits:

- (a) forfeiting the deposit of RM3,350,000.00;
  - (b) retaining an additional sum of RM5,150,000.00 paid by the Defendant to the Plaintiff towards the purchase price of the land; and
  - (c) recovering vacant possession of the land which had been substantially enhanced by the construction of the Batu Pahat Mall which cost the Defendant a sum of RM124 million in construction costs, and on which a further sum of RM80 million was spent by 155 tenants for interior works and which has independently and professionally been valued at RM387 million as at November 2007 without the Plaintiff having to pay the Defendant for such substantial enhancement.
12. Further or alternatively, the benefits described under Issue 11 (iii) above were not intended by the Defendant to be conferred gratuitously. In consequence, the Plaintiff is obliged to make compensation to the Defendant for the said benefits pursuant to Section 71 of the *Contracts Act, 1950*.”

## **Background Facts**

The background facts relevant to this appeal may briefly be stated as follows. By a written agreement dated 19.11.2004 (the Agreement) the Respondent agreed to sell to the Appellant a piece of land held under Grant 101840; Lot 325, Mukim Simpang Kanan, District of Batu Pahat, Johor (the said land) for a consideration of RM33,500,000.00 (purchase price) subject to the terms and conditions as agreed between the parties. Ten per centum of the purchase price was paid on the date of execution of the Agreement by way of deposit and as part payment towards account of purchase price. According to section 10 of the Schedule to the Agreement the balance sum of RM30,150,000.00 was to be paid by the Purchaser 4 months from the date the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser and upon inspection and confirmation by the purchaser. The sale is subject to the General and Special Conditions of Sale and according to clause 23 of the Agreement the Special Conditions shall prevail over any other terms or condition of the Agreement in the event of any inconsistency. On issue of delivery of vacant possession Special Condition No. 3 stipulates that:

“From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the

Purchaser shall be given 4 months from the date thereof to settle the balance of the purchase price to the Vendor.”

Therefore, the necessary steps for delivery of vacant possession to take place, firstly the Vendor need to confirm in writing that vacant possession is ready to be delivered and this is to be followed by inspection and confirmation by the Purchaser of the same. Under Special Conditions No. 1, the Vendor is given 6 months from the date of the Agreement to clear the squatters and 9 months to relocate the school occupying part of the said land in order to deliver vacant possession of the said land to the Purchaser.

In furtherance of the above terms and conditions the Respondent and Applicant conducted a joint inspection on the said land on 21.11.2005 to determine whether the Respondent was in a position to hand over vacant possession of the school land to the Applicant.

During the inspection Mr. Yiap Toon Cheng, General Manager of the Applicant attended on behalf of the Applicant. After the inspection he was asked to sign the letter prepared by the Respondent stating that:

“I hereby accept vacant possession of the said land on behalf of the aforesaid Purchaser.”

The Applicant's representative refused to sign the said letter as prepared by the Respondent but instead in his own hand writing wrote down the following note:

"I have jointly inspected the school land with Mr. Edwin Tan and Mr. Tang and confirm that the school administration has been relocated."

It is the Application's contention that the above note does not constitute acceptance of vacant possession by the Applicant of the said land. The Applicant contends that the said note merely confirms that the school administration had been located.

The Respondent on the contrary contends that the said note is clear proof that the Applicant had acknowledged receipt of vacant possession of the said land. If the Respondent's contention is right, then the period of 4 months together with automatic extension of 2 months to pay the balance of purchase price shall run from the 21.11.2005. The Applicant contends otherwise: they says that the period should run from the date the Respondent delivered the keys of the school gates to Applicant, that was on 28.2.2006. Taking this date the completion date would be 31.8.2006. Hence, there is clearly a dispute between the parties as to the date of delivery of vacant possession.

On 22.8.2006 the Applicant, through their solicitors made a further payment of the sum RM5,150,000.00 to the Respondent which was duly accepted by the Respondent.

On 21.4.2006 the applicant filed an application in the High Court at Johor Bahru vide O.S. No. MTI-24-1418-06 for a number declaratory reliefs arising from the Agreement. This was followed by the Respondent's claim which was filed on 28.8.2006 vide Civil Suit No. MT2-22-642 Tahun 2006. A summons in chamber under O 14A of the Rules of the High Court 1980 (the RHC) was filed on 28.9.2006 by the Respondent praying for a number of declaratory reliefs including that the vacant possession for the said land was delivered on 21.11.2005 and that since the Applicant fail to pay up the balance purchase price and the interest for extension of time by the 21.5.2006 the Respondent is entitled to forfeit the 10% deposit. The Applicant is further required to return the said land to the Respondent.

Vide paragraph (1) of the application the Respondent seeks the determination by the court as to the date of delivery of vacant possession of the said land as per Clause 12 of the Agreement and Special Conditions No. 1 and No. 3.

The Applicant opposed the application on among other grounds that:

- (i) the Respondent is seeking a determination on an issue of fact and not law or on construction of document;
- (ii) the said application is premature as only the Respondent's Statement of claim has been filed, the Applicant has yet to enter their defence when it is fixed for hearing on 28.9.2006;
- (iii) there is no specific issue of law or construction of document post to the Court for determination.

The learned Judicial Commissioner agreed with the Respondent that this is a fit and proper case to be dealt with under O14A. In his judgment he said that the application raised the question of construction of the Agreement namely clause 12 and Special Conditions No. 1 and No. 3. The answer to that question would then be applied to the undisputed facts of the case. He listed the undisputed facts in paragraph 4 (a) – (n) of his judgment. It is interesting to note what he said in paragraph (n):

“(n) The *first time* the Defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong wrote to complain was in their letter dated 8<sup>th</sup> March 2006. They alleged that the Defendant had all this time been prevented by school authority from entering

the premises and that vacant possession was delivered to the Defendant on 28<sup>th</sup> February 2006.”

From that it is obvious that the Applicant was taking issue on the question of the date of delivery of vacant possession. It may have done late in the day but there is clearly a dispute on the issue. The question is whether the dispute can properly be resolved by evaluating the affidavit evidence. That was what the learned Judicial Commissioner proceeded to do. This is found in paragraphs 13 to 15 of the judgment. And at paragraph 16 of his judgment he concluded in the following words:

“16) Looking at all the evidence submitted by both sides, I am sure that if the headmaster and the school teachers of the School are called as witnesses in court, they will all confirm that the School had moved to their new premises in November 2005, and the parents of the students will all confirm that they started attending classes at their new school premises in January 2006. I also have no doubt that if YB Datuk Mohd Aziz (the Member of Parliament of Sri Gading) is asked in court as a witness, he will also confirm that he attended the Opening Ceremony of the new school premises for Sekolah Hwa Nan. It will cause unnecessary delay and be a waste of time if they have to be called as witnesses to confirm what was already clear from

contemporaneous documents and photographs. Most important is that the material facts (summarized into 14 paragraphs above) were not in dispute for the purpose of construing the question of construction of the Special Conditions in the said Agreement.”

With respect to the learned Judicial Commissioner I do not think it is for the Court to speculate as to what would be the likely evidence of the various persons mentioned by him. In any event I am of the view that whether vacant possession was in fact delivered when the school was relocated, is a question of fact that can only be resolved after a full hearing and not through affidavit evidence.

I should also add that at the hearing before the Court of Appeal the Applicant successfully applied to adduce further evidence. Exhibits “YTC-1”, “YTC-2”, “YTC-3”, “YTC-4” and “YTC-5” are the new documentary evidence adduced by the Applicant to support their case. These exhibits are documents emanating from the school administration itself which the Applicant claims go to support their contention that they did not get vacant possession of the said land on 21.11.2005. It is certainly not for the High Court or the Court of Appeal or even this Court to resolve this issue of facts based on the conflicting affidavit evidence before the Court. It is against the above factual background that this application has to be considered.

## **Application Under O 14A**

O 14A was introduced into the RHC by the Rules of the High Court (Amendment) 2000 (PU A 342/2000) and came into force with effect from 21 September 2000. The relevant part of the Order provides:

### **“1 Determination of questions of law or construction (O 14A r 1)**

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

- (a) such question is suitable for determination without the full trial of the action; and
- (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.”

As far as I am aware there has been no reported decision of this Court on the interpretation and application of this Order. *Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu* (2004) 1 MLJ 8 is a decision of the Court of Appeal pertaining to an application made under this Order. The other reported decisions are that of the High Court. (See *Lekaz Construction Sdn. Bhd. v. KOP Petroleum Sdn. Bhd.* (2003) 4 CLJ 377; *Dato’ Ng Tian Sang v. Toh Pee Yok* (2004) 5 CLJ 153; *Hwe Chooi Yin v. Chew Pit King* (2006) 4 MLJ 790.)

The principles requirements under this Order are that:

- (a) the question of law or construction is suitable for determination without full trial of the action;
- (b) such determination will be final as to the entire cause or matter or any claim or issue therein;
- (c) the parties have had an opportunity of being heard on the question.

By necessary implication the question of law or construction must be stated in clear term when making the application, without which the Court would not be able to determine whether the question is one suitable for determination without a full trial. The question of law is, in normal cases, drawn from the pleadings filed. In *Watson & Anor v. Dutton Forshaw Motor Group Ltd. & Ors.* (1998) EWCA 3245 22 July 1998 it is stated that under O 14A the point of law or construction must be apparent on the pleadings. Hence the issue arises whether an application under this Order may be made prior to the filing of defence by the Defendant. This in my mind is an issue which ought to be resolved by this Court as a guidance for future cases. In the present case the application was made prior to Appellant even filing their defence. The question of law as framed by the Respondent are found in the Summons in Chambers filed herein. Paragraph (1) reads as follows –

“Menurut Aturan 14A Kaedah-kaedah Mahkamah Tinggi 1980, kandungan Perjanjian Jualbeli bertarikh 19hb November 2004 yang dibuat antara Plaintiff and Defendan ditafsirkan, terutama Klausula 12 Perjanjian tersebut dan Syarat-syarat Khas No. 1 dan No. 3 dalam Perjanjian tersebut untuk memutuskan tarikh Plaintiff menyerahkan milikan kosong tanah yang dikenali sebagai Geran No. 101840 Lot No. 325 Mukim Simpang Kanan, Daerah Batu Pahat kepada Defendan.”

From the question itself it is clear that it cannot be resolved purely on the construction of the stated clauses of the Agreement and the Special Conditions. The facts of the case need to be considered in order to answer the question posed to the Court. In this regard I agree with Zulkefli JCA (as he then was) that the present case is not suitable for disposal under O 14A. He gave the following reasons to support his finding:

- “(i) As no question of law or specific question on the construction of a document was framed, the Order 14A application ought to have been dismissed;
- (ii) The High Court was wrong to have determined the Order 14A application prior to the delivery of defence, thereby failing to identify the relevant issues in the action “*which necessarily ought to include the defendant’s defence to the action*”;
- (iii) There is a serious dispute as to the material facts viz-a-viz the date of delivery of vacant possession of the school to the Defendant, and the High Court was wrong in embarking on “*an expedition to evaluate conflicting evidence*”; and
- (iv) The new evidence admitted by the Court of Appeal at the commencement of the appeal further

strengthened the unsuitability of Order 14A proceedings.”

These are issues that call for determination by this Court. For the above reasons I am of the considered view that leave ought to be granted in respect of issues 1 – 7 pursuant to s. 96(a) of the Court of Judicature Act 1964. I am satisfied that both limbs as stated by Edgar Joseph Jr. FCJ in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of Sabah Foundation & Ors. And another application* (1990) 1 MLJ 257 have been fulfilled.

#### **Issues 8 – 12 (the additional issues)**

The issues here relate to the question of whether there was acquiescence in the continuance of the Agreement by conduct, as envisaged by s. 40 of the Contracts Act 1950 despite of the alleged repudiation of the Agreement, when the Applicant failed to pay the balance of the purchase price on the completion date of 21.5.2006 as contended by the Respondent. The so called conduct is the acceptance by the Respondent of the sum of RM5.15 million on 24.8.2006 and the failure to inform the Applicant that they are treating the Agreement as null and void and thereby forfeiting the deposit in pursuant the Clause 12 of the Agreement. The Respondent’s answer to that is that they are not required by the Agreement to do so and the said sum of RM5.15 million was retained as security for the return of their land by the Applicant.

The other issue raised herein is the question of unjust enrichment if the Respondent is allowed to get back his land, as the value of the said land had been substantially enhanced by the construction of the Batu Pahat Mall which cost the Applicant a sum of RM124 million.

All these issues could not be put forward to the Court at first instance as the Applicant was not given the opportunity to put in their defence. This relates to the earlier issue raised herein by the Applicant whether in an O 14A application, should the pleadings be closed first before a party can apply for determination of the case under the said Order. This is another issue which should be determined by this Court in view of the second requirement under this order that such determination will be final as to “the entire cause or matter or any claim or issue therein” (r. 1(1)(b).)

It may be true that the principles of law on the application of s. 40 of the Contracts Act 1950 and on unjust enrichment may be settled, but not so in the context of O 14A as arising in this case. It is clear that whether or not there was a proper acceptance of the repudiation of the agreement or whether there was unjust enrichment in the circumstances of the case, are questions of facts which cannot be settled through affidavit evidence. In this case these issues were never considered by the learned Judicial Commissioner as no defence had been filed.

## **Conclusion**

For the above reasons I am of the view that this is a fit and proper case for leave to be granted as both limbs of s. 96(a) of the CJA have been satisfied. This would in any case be the first case on O 14A to be decided by this Court and will certainly provide the opportunity to this Court to lay down authoritative guidelines as to the scope and requirements of the said Order.

For the above reasons I would allow the application herein and accordingly leave to appeal is hereby granted on all the questions as proposed by the Applicant. Costs in the cause. Deposit to be refunded to the Applicant.

Dated: 5<sup>th</sup> September 2008

**( DATO' ARIFIN BIN ZAKARIA )**  
**Federal Court Judge**  
**Malaysia**

Date of Hearing : 12.2.2008

Date of Decision : 5.9.2008

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