

**IN THE FEDERAL COURT OF MALAYSIA**  
**(APPELLATE JURISDICTION)**  
CIVIL APPLICATION NO. 08-221-2007 (J)

**BETWEEN**

**DREAM PROPERTY SDN BHD ... APPLICANT**  
**(Company No. : 661749-A)**

**AND**

**ATLAS HOUSING SDN BHD ... RESPONDENT**  
**(Company No. : 333147-D)**

(In the Court of Appeal Civil Appeal  
No. J-02-116-2006)

**Between**

**Dream Property Sdn Bhd ... Applicant**

**And**

**Atlas Housing Sdn Bhd ... Respondent**

**CORUM: RICHARD MALANJUM, CJSS**  
**ARIFIN BIN ZAKARIA, FCJ**  
**HASHIM BIN HAJI YUSOFF, FCJ**

## JUDGMENT OF RICHARD MALANJUM CJSS

1. I have read the separate Judgments by my learned brothers YA Dato' Arifin bin Zakaria FCJ and YA Dato' Hashim bin Haji Yusoff. I need not rehearse the background facts of this case as they have been dealt with adequately by my learned brothers.
  
2. Having given the matter an anxious consideration I am inclined to agree with the Judgment of my learned brother YA Dato' Arifin bin Zakaria that leave to appeal should be granted to the Applicant but in my judgment it should be limited to the first three proposed Questions submitted, namely, Questions 1,2 and 3 and 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?  
and
  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?

3. The other proposed Questions, in the order as submitted, are:
  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?”
  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.

4. While I concur with the reasons given in the Judgment of my learned brother YA Dato' Arifin bin Zakaria on the need for this Court to render a decision on the utility of Order 14A as a guide for the lower courts in future cases, I do not think there is any necessity to include the other proposed Questions. I am of the view that the proposed Questions 4 to 7 are within the ambit of the first three Questions as allowed while the substance of the rest of the proposed Questions is basically factual. Hence they should be left for the trial court to consider.
  
5. In any event if at the hearing of the appeal proper this Court answers in the negative to any of the three proposed Questions allowed and if the Applicant could show to the satisfaction of this Court that the learned High Court Judge and the Court of Appeal had failed to consider the limitations on the utility of Order 14A, then the inevitable conclusion would be for this case to go for full trial. Of course the Respondent is not precluded from taking any other step in accordance with the Rules of the High Court 1980 in order to avoid a full hearing.

6. Accordingly I allow this application subject to what I have stated above. The consequential orders prayed for in Encl. 2(a) are also granted in terms.

**SIGNED**

**(Tan Sri Richard Malanjum)  
Chief Judge, Sabah and Sarawak**

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

Counsel for Applicant : Tommy Thomas &  
Sitpah Selvaratnam

Solicitors for Applicant : M/s Tommy Thomas  
101, Jalan Ara  
Bangsar  
59100 Kuala Lumpur

Counsel for Respondent : D.P. Vijandran, Robert Devan,  
Analiza Kassim & K. Komathi

Solicitors for Respondent : Messrs Robert Devan & Co.  
3<sup>rd</sup> Floor, Wisma Mariamman  
No. 49, Leboh Ampang  
50100 Kuala Lumpur