DALAM MAHKAMAH TINGGI DI JOHOR BAHRU

DALAM NEGERI JOHOR DARUL EHSAN, MALAYSIA

[NO RAYUAN SIVIL: JA-12BNCVC-21-07/2018]

Antara

ASPIRASI TERNAMA SDN BHD
(No. Syarikat: 902537-T) ... PERAYU

Dan

LENHONG MARKETING SDN BHD
(No. Syarikat: 191260-H) ... RESPONDEN

(Dalam Mahkamah Sesyen Di Johor Bahru

Dalam Negeri Johor Darul Takzim, Malaysia

Writ Saman No: JA-A52NCVC-217-11/2017

Antara

Lenhong Marketing Sdn Bhd
(No. Syarikat: 191260-H) ... Plaintif

Dan

ASPIRASI TERNAMA SDN BHD
(No. Syarikat: 902537-T) ... Defendant)

JUDGMENT

Introduction

[1] On 20.12.2017, the Sessions Court Judge (hereafter 'SCJ') ordered the appellant, who was the defendant, to pay the respondent, who was the plaintiff, a sum of RM270,510.96 as agreed damages in a written sale and purchase agreement (hereafter 'SPA'). Dissatisfied with the decision of the SCJ, the appellant filed an appeal to the High Court.

[2] On 19.2.2019, this Court allowed the appellant's appeal and the decision of the SCJ was set aside. The reasons for the decision of this Court are set out as below. For ease of reference, the parties shall be referred to as they were at the court below.

Background Facts

[3] On 18.1.2012, the parties entered into the SPA. The defendant agreed to sell and the plaintiff agreed to purchase a unit of 1 ½ storey terrace corporate factory situated on a piece of land having a master title known as Geran 100603 Lot 436 in the Mukim of Tebrau, District of Johor Bahru (hereafter 'the property').

[4] The plaintiff's claim is for agreed damages based on clause 24 of the SPA. Clause 24 states as follows:

> *'**TIME FOR HANDING OVER OF VACANT POSSESSION***
>
> *Subject to any extension or extensions of time as may be allowed by the Vendor's Architect and provided that the Purchaser shall have paid to the Vendor all instalments of*

the Purchase Price and any other sums under this Agreement as and when due and payable, the said Building, without any alterations and/or additions as stipulated under Clause 15 hereof, shall be practically completed (as certified by the Vendor's Architect) and be ready for delivery of vacant possession to the Purchaser ***within twenty four (24) months from the approval date of the Proposed Building Plans by the local authorities or the date of this Agreement, whichever shall be later*** [emphasis added]. *In the event that the Vendor shall delay completion of the said Building and the delivery of vacant possession of the said Building to the Purchaser beyond the aforesaid period the Vendor shall pay to the Purchaser agreed damages calculated from day to day at the rate of ten per centum (10%) per annum on the Purchase Price of the said Property from such aforesaid date to the date of actual or deemed delivery of vacant possession of the said Building to the Purchaser as hereinafter provided, whichever date shall be earlier. PROVIDED ALWAYS that if in the opinion of the Vendor's Architect completion or delivery of vacant possession of the said Building is delayed:-*

(a) due to the delay by the Appropriate Authority or in granting approval to the Proposed Building Plan for any reason whatsoever;

(b) resulting from any amendments to the Building Plan (whether required by the Appropriate Authority or otherwise); or

(c) due to any force majeure referred to in Clause 28 hereof;

> *then and in any such cases, the Vendor's Architect shall make a fair and reasonable extension of time for completion and delivery of vacant possession of the said Building which decision shall be final and binding on the parties hereto.'*

[5] The pith of the defendant's appeal centres on one issue which is: when should the computation of twenty four (24) months for the delivery of vacant possession of the property begin – whether from the date of the approval of the Proposed Building Plan or from the date of the SPA?

[6] Clause 24 clearly provides that the commencement of the computation of twenty four (24) months depends on the latter of the two events – either the approval date of the Proposed Building Plan or the date of the SPA, i.e. 18.1.2012.

[7] From the notes of evidence, the defendant's architect, WKL Project Consultancy Services, received a letter dated 21.6.2015 from the *Majlis Bandaraya Johor Bahru* informing that the *Jawatankuasa Unit Pusat Setempat* (OSC) had approved the Proposed Building Plan on 16.6.2015. This Court shall take the date 16.6.2015 as the date of the approval of the Proposed Building Plan, not the date 21.6.2015 as pleaded by the plaintiff.

[8] Based on the plain reading of clause 24, vis-*à*-vis 'whichever shall be later', the date 16.6.2015 is the later date of the two events. Therefore, the computation of twenty four (24) months should commence on 16.6.2015 and end on 15.6.2017.

[9] Vacant possession of the property was deemed delivered to the plaintiff on 7.3.2016. As such, the handing over of vacant possession of the property was within the twenty four (24) month period, i.e. the period between 16.6.2015 and 15.6.2017.

[10] Since the property was delivered to the plaintiff within the twenty four (24) month period, there is no issue of delay in the delivery of vacant possession. The defendant's counsel submits that the plaintiff's claim for agreed damages as stipulated in clause 24 is without basis.

[11] However, the plaintiff's counsel submits that the date of commencement for the computation of twenty four (24) months ought to be the date of the SPA, i.e. 18.1.2012, and that the twenty four (24) month period expired on 17.1.2014. The delivery of vacant possession was, therefore, delayed by 782 days, i.e. from 18.1.2014 to 7.3.2016. The plaintiff is entitled to claim the agreed damages. The agreed damages amounting to a sum of RM252,810.96 (excluding the payment of RM17,700.00 for GST) was rightly awarded by the SCJ to the plaintiff, the plaintiff's counsel submits.

[12] The plaintiff's counsel further submits that the legal maxim *nullus commodum capere potest de injuria sua propria* which means 'no one can derive an advantage from his own wrong' applies in this case. The plaintiff's counsel submits that the defendant breached several provisions of the SPA. Because of the breach, the defendant could not take advantage of its own wrong. The defendant could not rely on the literal meaning and the plain reading of clause 24 of the SPA in order to avoid paying the agreed damages.

[13] The wrong doing of the defendant relied on by the plaintiff is this: the defendant commenced construction of the property before the approval of the Proposed Building Plan.

[14] The defendant started earthworks in 2012. After the completion of the earthworks in 2014, the defendant proceeded with the construction of the factory building. The factory building was constructed throughout the years 2014 and 2015. At different stages of construction, the defendant requested progressive payments based

on the Schedule of Payments (or Third Schedule) of the SPA from the plaintiff. The plaintiff paid the first progressive payment on 30.7.2014 for the completion of earthworks. The defendant paid the penultimate progressive payment on 13.8.2015 which was for stage 2(g) of the Third Schedule – commencement of roads, drains and sewerage works of the said property. The last payment was made on 22.2.2016 for handing over of vacant possession. On 7.3.2016, vacant possession of the property was deemed delivered.

[15] The plaintiff avers that the defendant breached clauses 14 and 21 of the SPA. The relevant part of clauses 14 and 21 are reproduced below:

> *14(1) The Vendor shall cause to be constructed the said Property in a good and workmanlike manner in compliance with generally recognized building standards and practices,* ***in accordance with the Proposed Building Plan as duly approved by the Appropriate Authorities*** [emphasis added] *and in accordance with the specifications annexed hereto as the Fourth Schedule (hereinafter referred to as "the Specifications") and the Proposed Building Plan and the Specifications have been accepted by the Purchaser who hereby acknowledges and confirms the same."*
>
> *"21(1) The Vendor shall, in relation to the said Property to be erected,* ***conform to the provisions and requirements of any written law for the time being in force affecting the Development*** [emphasis added] *and shall keep the Purchaser indemnified against all fines, penalties or losses incurred by reason of any breach of the provisions of any written laws from the Vendor."*

[16] The plaintiff complains that the defendant commenced construction of the property before the approval of the Proposed Building Plan,

[17] Further, the defendant violated the Town & Country Planning Act 1976, particularly s. 19(1) which states as follows:

> *"No person, other than a local authority shall commence, undertake or carry out any development unless planning permission in respect of the development has been granted to him under section 22 or extended under subsection 24(3)."*

[18] The plaintiff's counsel submits that the defendant started earthworks in 2012 without any planning permission. The planning permission was obtained only on 27.8.2014. Therefore, the defendant violated the Street, Drainage and Building Act 1974, particularly s. 70. Section 70 of the said Act states as follows:

> *"No person shall erect any building without prior written permission of the local authority."*

[19] The plaintiff's counsel submits that the defendant contravened the above provisions of the law, and was therefore in breach of clauses 14 and 21 of the SPA.

[20] The plaintiff's counsel submits that the defendant should not be allowed to take advantage of its own wrong to assert the computation of twenty four months started from the date of approval of the Proposed Building Plan. The plaintiff's counsel further submits that the defendant demanded the progressive payments ahead of the approval of the Proposed Building Plans, therefore, the computation of twenty four (24) months must commence from the date of the SPA.

The Findings of this Court

[21] The plaintiff's counsel is leveraging on the legal maxim *nullus commodum capere potest de injuria sua propria* (no one can derive an advantage from his own wrong) to challenge the literal meaning of the operative words of clause 24 of the SPA. The operative words in clause 24 are '*whichever shall be later*'.

[22] It is trite that legal maxim is always subject to the overriding general principle that an instrument must be construed in accordance with the expressed intention of the parties (see *Kong Ming Bank Bhd v. Leong Ho Yuen* [1982] 2 MLJ 111, FC). It is also trite that the court must give effect to the intention of the parties (see *Mulpha Pacific Sdn Bhd v. Paramount Corp Bhd* [2003] 4 MLJ 357, CA). The true intention of the parties could be gained from the document itself by the words used. Notwithstanding a breach is found to be present in one part of the instrument, the court must still give effect to other parts of the instrument when the words used are certain, plain and unambiguous.

[23] In *Tibena Sdn Bhd v. Sabah Urban Development Corp Sdn Bhd* [2012] MLJU 1095, the defendant attempted to seek a declaration to void a letter of award issued to the plaintiff on the ground that the performance of the contract was impossible or frustrated. The reason given for seeking the declaration was that by the effluxion of time the conditions precedent contained in the letter of award could not be performed, therefore, parties were asked to be released from their respective obligations. One of the conditions precedent was that the defendant was required to seek financing for the project. The High Court held that the defendant's wilful refusal to fulfil that condition precedent had therefore evinced an intention not to be bound by the agreement and that the defendant had in turn repudiated the same, and as such, the defendant could not rely on its own wrong to argue the

performance of the contract was impossible or frustrated. The defendant sought a direct advantage from his wilful refusal to fulfil one of the conditions precedent in the agreement. As such, the defendant could not take advantage of its own wrong doing and benefit from it to not perform the contract. The court rightly applied the legal maxim *nullus commodum capere potest de injuria sua propria*. The application of the legal maxim in ***Tibena Sdn Bhd*** did not accord the right to the court to vary or ignore any material term in the contract.

[24] In *KS Chan Brothers Development Sdn Bhd v. Tan Kon Seng & Ors* [2001] 6 MLJ 636, the High Court held that the omission on the part of the appellant/defendant to attach the approved building plan in the sale and purchase agreement was in breach of the statutory form. Hence, the defendant could not take advantage from its own omission to argue that the defendant was not bound by approved building plan. Again, in this case, the court applied the legal maxim, but the court did not ignore any material provision in the agreement.

[25] In *Light Style Sdn Bhd v. KFH Ijarah House (M) Sdn Bhd* [2009] 3 CLJ 370 and *Senga Engineering & Construction Sdn Bhd v. Richwin Holdings (M) Sdn Bhd* [2016] 7 CLJ 463, the wrongdoer in the respective cases was the party who brought the suit claiming for damages. In the former, the wrongdoer had colluded with the defendants to circumvent the Money Lenders Act 1951; whereas, in the latter, the wrongdoer had full knowledge the building was constructed without proper approvals and was illegal, yet the wrongdoer proceeded with the construction and claimed for monetary compensation. In both cases, the courts applied the legal maxim, but the courts did not alter or ignore any material provisions of the contracts in question.

[26] In the above cases cited by the plaintiff's counsel, the party who had committed a wrongdoing attempted to gain a direct advantage from his wrongdoing to make a claim or to seek a relief from the court.

[27] In the instant case, it is the plaintiff who is making a claim for agreed damages under clause 24 of the SPA. In order to succeed in its claim for agreed damages under clause 24 of the SPA, the plaintiff urges this Court to ignore the certain, plain and unambiguous operative words of clause 24 of the SPA.

[28] The plaintiff's case is the defendant cannot rely on the certain, plain and unambiguous operative words because the defendant committed a wrongdoing, namely, to commence construction of the property before the approval of the Proposed Building Plan by the relevant authority.

[29] The Court is of the considered view that the plaintiff cannot rely on the legal maxim *nullus commodum capere potest de injuria sua propria* to ignore the certain, plain and unambiguous meaning of clause 24 in order to reach a construction of clause 24 that would allow it to claim agreed damages when the meaning does not provide such claim.

[30] The Court is further of the considered view that the plaintiff cannot use the legal maxim against the defendant in this case because the defendant is merely relying on a meaning of clause 24 based on the plain and unambiguous wording in order to defend the plaintiff's claim which departs from the meaning of clause 24.

[31] The defendant could not be said to have derived any direct advantage with respect to the meaning of clause 24 by its breach of clauses 14(1) and 21(1) of the SPA in commencing construction of the property before obtaining approval of the Proposed Building Plan.

The meaning of clause 24 remains the same regardless whether the defendant had commenced the construction of the property before or after obtaining approval of the Proposed Building Plan.

[32] It is not the plaintiff's case that the defendant had wilfully delayed in applying for the necessary approvals of the Proposed Building Plan so that it could take advantage of its wilful delay for the computation of twenty four (24) months to begin from the date of the approval.

[33] The plaintiff should not be allowed to misuse the legal maxim to depart from the plain and unambiguous meaning of clause 24 for the purpose of making a claim against the defendant.

[34] If this Court were to hold that the computation of the twenty four (24) months should commence from the date of SPA, as submitted by the plaintiff's counsel, then this Court would be rewriting the plain and literal meaning and the true intention of clause 24 of the SPA. It is trite that the court is to refrain from rewriting the terms of a contract when the words used are certain, plain and unambiguous. In this case, the meaning of clause 24 is certain, plain and unambiguous. It is not necessary to adopt any legal principle or rely on any interpretation aids to grasp the meaning of clause 24.

[35] The plaintiff's counsel also raised the issue of illegality in his submission. On this issue, this Court is of the considered view that the submission is misconceived. If the SPA was illegal, in whatever context raised by the plaintiff's counsel, it would result in the entire contract being unenforceable. How can the plaintiff rely and claim the agreed damages in clause 24 of the SPA if it was illegal? The issue of illegality of the contract is inconsistent with the plaintiff's claim.

[36] One last point this Court would like to comment is the issue of estoppel raised by the plaintiff. This issue was raised for the first time

during further submissions stage. The issue of estoppel was not raised at the court below, neither was it raised or pleaded in the statement of claim. It is trite law that parties are bound by their pleadings. Further, the plaintiff did not refer to any evidence to support any finding of estoppel against the defendant. Hence, this issue is misplaced in the further submissions stage.

Conclusion

[37] For the reasons which this Court has given, the defendant's appeal is allowed. This Court orders costs of RM4,000.00 (subject to allocator fees) to the defendant; the SCJ's decision is set aside.

Dated: 7 APRIL 2019

(CHOO KAH SING)
Judge
High Court Johor Bahru

COUNSEL:

For the defendant/appellant - Christopher Yeo & Angie Tam; M/s David Gurupatham & Koay

For the plaintiff/respondent - Khutubul Zaman & Anis Zaman; M/s Syarizad Zaman & Seah

Case(s) referred to:

Kong Ming Bank Bhd v. Leong Ho Yuen [1982] 2 MLJ 111, FC

Mulpha Pacific Sdn Bhd v. Paramount Corp Bhd [2003] 4 MLJ 357, CA

Tibena Sdn Bhd v. Sabah Urban Development Corp Sdn Bhd [2012] MLJU 1095

KS Chan Brothers Development Sdn Bhd v. Tan Kon Seng & Ors [2001] 6 MLJ 636

Light Style Sdn Bhd v. KFH Ijarah House (M) Sdn Bhd [2009] 3 CLJ 370

Senga Engineering & Construction Sdn Bhd v. Richwin Holdings (M) Sdn Bhd [2016] 7 CLJ 463

Legislation referred to:

Town & Country Planning Act 1976, s. 19(1)

Street, Drainage and Building Act 1974, s. 70