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1. *Permata Realty Sdn Bhd v Broadway Lifestyle Sdn Bhd [2021] MLJU 1936*

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PERMATA REALTY SDN BHD v BROADWAY LIFESTYLE SDN BHD

CaseAnalysis

| [2021] MLJU 1936

Permata Realty Sdn Bhd v Broadway Lifestyle Sdn Bhd [2021] MLJU 1936

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD NAZLAN MOHD GHAZALI J

GUAMAN SIVIL NO WA-22NCVC-708-10/2020

14 June 2021

Chin Tan (Chan Zhi En with him) (JM Chong Vincent Chee & Co) for the plaintiff.
*Clifford Lee (Ng Sian Yen with him) (**David Gurupatham** & **Koay**) for the defendant.*

Mohd Nazlan Mohd Ghazali J:

JUDGMENTIntroduction

[1]This case concerns an application by the plaintiff for summary judgment against the defendant, as documented in enclosure 7. I allowed the same at the conclusion of the hearing. This judgment contains the full reasons for my decision.
Key Background Facts

[2]Pursuant to a Sale and Purchase Agreement dated 21 October 2019 ("the SPA"), the plaintiff agreed to sell to the defendant a piece of leasehold industrial land held in Mukim Dengkil, District of Sepang, Selangor ("the Property") at a total purchase price of RM87,825,672.00.

[3]The claim in this case essentially relates to the dispute on the entitlement of the plaintiff to the payment of interest due to late payment of the balance purchase price by the defendant under the SPA.

[4]After payment of the 10% deposit, the defendant was under the SPA contractually obliged to pay a total sum of RM78,787,271.46 being the final balance purchase price to the plaintiff's solicitors as stakeholders within three months from the unconditional date or the date of the SPA, whichever was the later.

[5]This the defendant failed to do by the stipulated timeline.

[6]Clause 3.1(c) of the SPA as a result became applicable, where a late payment interest of 8% per annum was chargeable until the date of receipt of full payment.

[7]The defendant's solicitors then requested for an extension of the completion period free of interest. However, despite having granted to the defendant an extension of time, the defendant still failed to deposit the final balance purchase price by the extended deadline, but only managed to do so subsequently. This in turn triggered the provision on the late payment interest under Clause 3.1(c) of the SPA.

[8]The plaintiff then sent a letter of demand for late payment interest for the sum of RM1,520,983.99 but the defendant did not provide any response. Another letter of demand followed, this time for the outstanding sum of RM1,545,535.48 consisting of late payment interest in the sum of RM1,520,983.99, and the apportioned quit rent charges in the sum of RM24,551.49.

[9]The plaintiff initiated a writ action which service was effected on the defendant's solicitors on 3 November 2020, and the day after the defendant made payment for the said apportioned quit rent charges of RM24,551.49. Despite that payment, the sum of RM1,520,983.99 remains due and owing by the defendant to the plaintiff. Given the refusal of the defendant to pay the same, the plaintiff moved to file the suit and now sought a summary judgment be entered against the defendant in enclosure 7.

[10]In response, the defendant filed a counterclaim for primarily, compensatory damages for the sum of RM2,745,152.15, alleging that the plaintiff breached the SPA as it did not perform its obligation to provide an assessment confirmation letter in respect of the Property within the stipulated time, causing a long delay to the completion of the SPA. But first I will next state in summary fashion the law on summary judgment.

Law on Summary Judgment - A summary

[11]This case concerns an application for summary judgment under Order 14 of the Rules of Court 2012 ("the RC 2012"). It is well-established and already settled law that once an Order 14 application is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a *"bona fide triable issue"*, in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[12]This is entirely in keeping with the requirements of Order 14 r 3 of the RC 2012 which provides that unless the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that:-

(a) there is an issue or question in dispute which ought to be tried: or

(b) there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the Plaintiff against the Defendant on that claim or part as may be just having regard to the nature of the remedy or relied claimed.

[13]As such, in the often quoted decision of the former Supreme Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* *[1984] 2 MLJ 300* it was authoritatively ruled as follows:-

> "We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:-
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14".
>
> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him"

[14]As the plaintiff in this case has satisfied these preliminary requirements, and this is also not disputed by the defendant, the burden is now firmly on the defendant to show that there is a triable issue that does not justify summary judgment be entered against the defendant.

[15]If the defendant can demonstrate even one triable issue, this Court will not grant summary judgment. But it has to be a genuinely triable issue. As made clear by the Federal Court in *Voo Min En & Ors v Leong Chung Fatt* *[1982] 2 MLJ 241*, it is not enough for a defendant to raise an issue or any issue. The defendant must instead raise such issue as would require a trial in order to determine it.

[16]The defendant advanced a number of arguments which it said constituted triable issues and reasonable defence which would render a summary disposal of this case unsuitable and unjustified. In essence and substance there are two key not unrelated defences; first, the plaintiff is not entitled to claim interest on late payment and secondly, it had in any event waived such right under the SPA. These are what I shall next examine.
Analysis & FindingsWhether the plaintiff is not entitled to interest on late payment

[17]The crux of the defendant's opposition is rooted in its reliance on Clause 3.2 of the SPA which the defendant contended justified a grant of an extension of time for the defendant to make payment of the balance purchase price, free of interest because of the plaintiff's alleged failure to furnish the current assessment receipt on the Property.

[18]To start with, I think it is very clear that the questions raised by parties and to be determined by this Court

concern only a construction of contract, that is the SPA, and basically no other. I am reminded in this respect of the observations of Raja Azlan Shah J (as HRH then was) in *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168 as follows:-

> "It is I think right that an order under R.S.C. Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment, is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed".

[19] This was reaffirmed by the Federal Court in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 where Raja Azlan Shah J (as HRH then was) again observed:-

> "*Esso Standard Malaysia Bhd v Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168. I pointed out that in an Order 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case".

[20] In this analysis of mine, it would not therefore be remiss of me to make reference to the provisions of the SPA which would bear relevance to the issues raised in this application. The first is the payment obligation of the defendant, which is set out in Clause 3 of the pertinent parts of which are as follows:-

> 3. Payment of Purchase Price
>
> 3.1 The Purchase price shall be paid by the Purchaser in the following manner:-
>
> ……...
>
> (b) A sum of Ringgit Malaysia Seventy Nine Million Forty Three Thousand One Hundred Four and Cents Eighty (RM79,043,104.80) only equivalent to ninety per centum of the Purchase Price ("Balance Purchase Price") shall be paid by the Purchaser in the following manner:
>
> (i) Upon the execution of this Agreement, the Purchaser shall pay to Vendor, a sum of Ringgit Malaysia Two Hundred Fifty Five Thousand Eight Hundred Thirty Three and Cents Thirty Four (RM255,833.34)……...
>
> (ii) Within three (3) months from the Unconditional Date or the date of this Agreement, whichever is later (hereinafter referred to as "the Completion Period") the Purchaser shall pay the balance sum of Ringgit Malaysia Seventy Eight Million Seven Hundred Eighty Seven Thousand Two Hundred Seventy One and Cents Forty Six (RM78,787,271.46) only (hereinafter referred to as "the Final Balance Purchase Price") to the Vendor's Solicitors as stakeholders to be dealt with in accordance with the provisions of this Agreement.
>
> (c) In the event that the Purchaser is unable to pay the Balance Purchase Price within the Completion Period for any reason, the Vendor shall grant to the Purchaser an extension of three (3) months from the date of expiry of the Completion

> Period (hereinafter referred to as "the Extended Completion Period") to pay the Balance Purchase Price provided always that the Purchaser shall pay to the Vendor interest on the Balance Purchase Price or any outstanding balance thereof at the rate of Eight per centum (8%) per annum calculated on a day to day basis from the first day of the Extended Completion Period until the date of receipt of full payment by the Vendor's Solicitors, and such late payment interest shall be paid by the Purchaser at the same time as the Balance Purchase Price or any part thereof is released to the Vendor's Solicitors in accordance with the terms and conditions as herein provided.

[21]I do not think it can be refuted that Clause 3.1 (b) (ii) provides for the obligation on the defendant, as the purchaser to make payment of the sum of RM78,787,271.46 being the final balance purchase price within three months (the completion period) from, on the facts of this case, the Unconditional Date. This Unconditional Date of the SPA is defined under Clause 2.2 as the date of the receipt of a copy of the State Consent (being one of the conditions precedent in the SPA) by the purchaser's solicitors from the vendor's solicitors. This was received on 5 March 2020. It also became the Unconditional Date.

[22]Despite Clause 3.1 (b) (ii) and the fulfilment of the Unconditional Date, the defendant as mentioned earlier, failed to honour the said contractual promise by the expiry of the three month (interest free) completion period on 4 June 2020.

[23]Clause 3.1 (c) however envisaged this situation on non-payment by the purchaser and provided that the completion period for payment shall be extended by the vendor for three more months, subject to payment of interest by the defendant to the plaintiff at the rate of 8% per annum calculated on a daily basis from the first day of extended completion period until the date of full receipt (which would have to be within the said extended three-month period).

[24]The defendant however wrote to the plaintiff on 5 June 2020 and sought for an extension of the interest free original completion date to 30 June 2020 instead (which had expired on 4 June 2020), and consequently the extended completion period would start on 1 July 2020 and expire on 30 September 2020. The plaintiff agreed, although it did not have to, since such an extension was not contemplated in the SPA. But parties are at liberty to make such express variation. This is a manifestation of the principle of the freedom of contract and is also envisaged in Clause 24(b) in the SPA which states that any amendment to any provision of the SPA is effective and binding if agreed to in writing by both the contracting parties.

[25]As it turned out, the defendant did not pay by the mutually agreed extended interest free period which ended on 30 June 2020. It was finally made only on the final date of the extended completion period under Clause 3.1 (c), which therefore meant that interest was chargeable at 8% from I July 2020 until receipt of the final balance purchase price on that 30 September 2020. The claim for this interest for late payment is the basis of this writ action instituted by the plaintiff against the defendant.

[26]The defendant's take on the provisions of the SPA relevant to the late payment is however quite different. The source of this divergence is that the plaintiff had only deposited with the defendant's solicitors the confirmation letter

from the relevant municipality the assessment payable on the Property on 12 March 2020 pursuant to Clause 7.1 (a) (iv) of the SPA.

[27]Clause 7.1 (a) states the following:-

> 7.1 Upon the execution of this Agreement:
>
> (a) The Vendor shall deposit with the Purchaser's Solicitors the following:
>
> .....
>
> (iv) a copy of the current assessment receipt in respect of the said Property (in the event that there is no assessment payable for the said Property, the letter from the municipality addressed to the land office confirmaing that there is no assessment payable for the said Property),
>
> .....

[28]The defendant contended that *section 52* of the *Contracts Act 1950* is applicable to the SPA which consisted of reciprocal and mutual promises to be simultaneously performed. The plaintiff, according to the defendant, was immediately obligated to deposit with the defendant's solicitors the documents specified in Clause 7.1 (a). Despite reminders, the plaintiff was only finally able to deposit the confirmation of the assessment letter on 12 March 2020, which represented a delay of 143 days upon the execution of the SPA on 21 October 2019. This, according to the defendant, caused the delay in the defendant obtaining a loan to finance the purchase of the Property.

[29]In view of this, it is the defendant's contention that Clause 3.2 of the SPA was triggered, such that the delay of 143 days ought to be deemed to be time extended in favour of the defendant as the purchaser, crucially free from interest and that the completion period should be extended accordingly free of interest to compensate for the said period of delay attributed to the plaintiff.

[30]This line of argument advanced by the defendant is not unattractive. But it is misconceived. It is not what Clause 3.2 of the SPA says.

[31]Clause 3.2 reads thus:-

> "3.2 The Vendor hereby agrees that in the event the Vendor and/or the Vendor's Solicitors is unable to fulfil any of their obligations on or by the date or within the time period stipulated in Clauses 5.3, 7.3 and 7.4 hereof, the number of days delayed beyond the date or time period stipulated therein shall be deemed to be the time extended in favour of the Purchaser free of interest and the Completion Period or Extended Completion Period or Final Extended Completion Period shall then be extended accordingly free of interest to compensate for the period of delay utilized thereby Provided Always that nothing herein contained shall prejudice the rights and remedies of the Purchaser under the provisions of this

Agreement or otherwise under the law FURTHER PROVIDED THAT where any request of the Purchaser's Solicitors or the Financier's Solicitors for documents which the Vendor or the Vendor's Solicitors are obliged to deliver or cause to be delivered under the said clauses of this Agreement, is made before the Unconditional Date, then the Vendor's Solicitors shall be deemed to have received such request on the Unconditional Date. In the event there are overlapping of days in respect of any delay in any of the matters referred to in Clauses 5.2, 7.3 and 7.4 the days that overlapped and fall on the same date shall be calculated concurrently and not consecutively."

[Emphasis added]

[32]It is crystal clear from a plain reading of Clause 3.2 that the SPA acknowledges that the period of delay on the part of the plaintiff in performing its promises would result in the corresponding extension of the various permutations of the completion period, as might be applicable (thus giving the defendant more time to make payment of the balance purchase price). And equally importantly, it is manifest that this compensatory arrangement is applicable only in relation to the obligations of the plaintiffs as stated in the provisions in the three Clauses 5.2, 7.3 and 7.4, and no other. Clause 3.2 does not extend to Clause 7.1 which parties must have agreed to exclude from the operation of this provision.

[33]As such, the circumstances spelt out under Clause 3.2 of the SPA in which the defendant could be granted an extension of time free of interest would include only provisions in Clauses 5.2, 7.3 and 7.4 of the SPA. The alleged failure of the plaintiff to furnish the assessment receipt, which is its obligation under Clause 7.1(a) (iv) of the SPA does not give rise to any free of interest extension of the completion period in favour of the defendant.

[34]It is not inaccurate to say that the SPA before this Court also contains reciprocal promises. The defendant referred among others, to my decision in the case of *Leong Ah Kew & Ors v Prisma Suria Sdn Bhd* [2015] 8 CLJ 300.

[35]The plaintiffs in that case in their claim pleaded that the defendant had breached the joint venture agreement ("the JVA") for having failed to complete the construction and development of the houses as set out in the JVA within five years from the date of the approvals from the land office. This failure, it was argued, entitled the plaintiffs to terminate the agreement under clause 13(b) of the same. The defendant on the other hand, argued that despite having secured the requisite approvals, they were prevented from commencing construction of the housing project because the plaintiffs had, in breach of clause 5(e) of the JVA failed to evict the squatters and demolish their factory buildings on the said land.

[36]The High Court in *Leong Ah Kew (supra)* decided that even though the obligation of the plaintiffs to evict the squatters was not a condition precedent in the JVA, it was an implied term in the JVA that the eviction, a stated obligation of the plaintiffs, must first happen before construction work, a stated obligation of the defendant, could commence. The High Court in that case also invoked Section 52 of the Contracts Act 1952 which states that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

[37]As significantly, the High Court also applied Section 53 of the same Act which provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, but that where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[38]I then concluded *Leong Ah Kew* (supra) in the following manner:-

> "[45] Therefore, in my judgment, in the instant case, since the plaintiffs failed to perform their promise in cl. 5(e), which should have happened first before the defendant could commence construction as per cl. 7 (either due to the application of *s. 53* of the *Contracts Act 1950* or the court implying a term into cl. 5(e) to give business efficacy to the contract), the plaintiffs clearly cannot claim against the non-performance of the reciprocal promise by the defendant in the said cl. 7. Since the plaintiffs are not entitled to make a claim against the defendants, their action in this case must therefore fail".

[39]The situation in *Leong Ah Kew* (supra) is not the same as in the case now before me. There are various reasons. Land must obviously be cleared by or at the behest of the owner before it can be developed.

[40]Further, matters concerning the assessment receipt is clearly stated in Clause 7.1 but so conspicuously not mentioned in Clause 3.2, suggesting it is not a *sine qua non* for completion. Further, the absence of the assessment receipt should not necessarily impede the defendant from applying for financing or to pay to the plaintiff the final balance purchase price of RM78,787,721.46. And neither should it delay the presentation of title at the land office, precisely because Clause 6.1(c) of the SPA plainly contemplates that the presentation of title could only be done after receipt of the final balance purchase price by the plaintiff's solicitors.

[41]Above all, the defendant's assertion in relation to the bank's requirement to produce assessment receipt before any loan can be approved is unsupported by evidence. This is especially telling since there is no evidence that the defendant had disputed the plaintiff's position on the imposition of interest for late payment on the defendant under Section 3.1 (c), as notified to the defendant. There was no response to the plaintiff's letter of 7 October 2020 setting out the computation of the late payment interest. Neither was there any to the subsequent letter of 16 October 2020. Not until after the service of the writ and the statement of claim did the defendant finally respond, and even then only to pay the apportioned quit rent charges. The sum of RM1,520,983.99 continued to be due and owing by the defendant to the plaintiff. Yet the argument about the plaintiff not being entitled to the interest in this case which is the key defence of the defendant in this action, as well being the thrust of its counterclaim was not surfaced earlier by the defendant. This suggests a convenient, self serving afterthought.

[42]Another point is this. Clause 3.4 states that the completion of the sale and purchase of the Property shall take place upon the receipt of the balance purchase price and late payment interest, if any, by the plaintiff's solicitors in accordance with Clause 3.1 (b) and (c) (as applicable). This makes it manifest that furnishing the assessment receipt is not a pre-requisite to the completion of the purchase transaction.

[43]And neither can Clause 3.2 be interpreted in a manner contended by the defendant which is in reference to two types of obligation. First, all obligations under the SPA, and secondly those obligations in Clauses 5.2, 7.3 and 7.4 of the SPA. I need only mention three brief points in response. First, the drafting of Clause 3.2 is clear and to suggest otherwise would unnaturally strain its language. What it says is that the defendant could only be granted an extension of time free of interest in the event the plaintiff is unable to fulfil any of their obligations, either on the date stipulated in Clauses 5.2, 7.3 and 7.5; or by the date stipulated in Clauses 5.2, 7.3 and 7.4 or within the time period stipulated in Clauses 5.2, 7.3 and 7.4. There could be no other possible interpretation.

[44]Secondly there is no logical basis to make that distinction if the consequence is the same for both types of obligations. In other words Clause 3.2 could have just mentioned all obligations since that would also obviously cover the three specific provisions in Clauses 5.2, 7.3 and 7.4. Thirdly, the proviso to that same Clause 3.2 too mentions only these three clauses when addressing the issue on overlapping days in the delays in the discharge of the obligations, in reference to the same three clauses only and no other.

[45]As such, this argument on the attempt to rely on Clause 3.2 of the SPA to justify a grant of an extension of time free of interest as a result of the plaintiff's alleged failure to provide the current assessment receipt is not a triable issue.

Whether the plaintiff's right to claim for late payment interest is waived

[46]The defendant here argued that as what had transpired, the fact that plaintiff had proceeded under Clause 3.4 to release the title document of transfer to the defendant's solicitors without insisting on the payment by the defendant of the late payment interest constitutes a waiver from charging late payment interest subsequent to the event because Clauses 3.3 and 3.4 operate immediately upon full payment of the balance purchase price.

[47]I do not think this is a correct appreciation of the workings of the clauses in the SPA. First, nowhere in the SPA does it state that the plaintiff must qualify or reserve its right to claim late payment interest within a specific time frame. Secondly, under Clause 22 it is expressly stated that time, wherever mentioned shall be of the essence. Thirdly, and most importantly Clause 24(g) provides that any acquiescence by the plaintiff of any breach by the defendant shall not be deemed to be a waiver of the plaintiff's rights under the SPA.

[48]In contrast, the defendant is expressly required under Clause 3.1(c) of the SPA to pay the plaintiff late payment interest for the extended completion period at the same time as the final balance purchase price was paid. And this is further repeated in Clause 3.4 as mentioned earlier as well as Clause 3.3 which reads that the receipt by the plaintiff of the balance purchase price together with late payment interest (if any) shall be deemed sufficient discharge to the defendant of the sum so received. The failure of the defendant to make such payment of late payment interest (despite notification by the plaintiff) where parties instead proceeded to complete the sale and purchase transaction cannot mean that the defendant is completely excused from making that payment.

[49]Furthermore, there is no reason for the defendant to make its point on the waiver by referring to provisions such as Clauses 5.1 on purchaser's loan, 7.3 on payment by purchaser's own fund and 13 on default by purchaser, when there is a clear and definitive provision which is directly related to the issue - Clause 24(g) of the SPA. Clause 24(g) of the SPA clearly stipulates that no knowledge or acquiescence by the plaintiff of the defendant's breach shall be deemed to be a waiver of the plaintiff's rights under the SPA. It is as clear as day.

[50]This I surmise is an appropriate juncture for me to mention briefly about the principles governing the interpretation of contracts which is essentially what this case is all about.

[51]The interpretation is to be based on the plain and ordinary meaning of the provisions of the contracts, having regard to the entirety of the contractual context, barring genuine ambiguities. In the Court of Appeal decision in *Syarikat Binaan Utara Jaya (A Firm) v Koperasi Serbaguna Sungei Glugor Berhad* [2009] 2 AMR 50, Abdul Malik Ishak JCA stated the following key principles:-

> "[15] Of course, it is trite that when interpreting a contract the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behari Deb v. Masrab Ali and Others* [1961] AIR Vol. 48, 173 Assam).
>
> [16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. To allow such evidence would involve the plain violation of *s. 92* of the *Evidence Act 1950* (*Afshar M. M. Tacki v. Dharamsey Tricamdas* [1947] AIR (34) 98 Bombay)".

[52]That judicial scrutiny ought to be confined to the four corners of the contract when the terms are clear is further reaffirmed by Abdul Malik Ishak JCA in *Syarikat Binaan Utara Jaya* as follows:-

> "[17] From the available authorities, the following propositions may be advanced in construing a contract where the language employed is clear:
>
> (a) the court must give effect to the plain meaning of the words, no matter how distasteful the result may be (*The Central Bank of India Ltd. Amritsar v. The Hartford Fire Insurance Co. Ltd.* [1965] AIR Vol. 52, 1288 SC);
>
> (b) where the language in the document is unambiguous and clear, the real nature of the document is to be determined solely by looking at its contents, uninfluenced by any intention of the parties ((*Nawab Major Sir) Mohammad Akbar Khan v. Attar Singh and Others* [1936] AIR Vol. 23, 171 PC);
>
> (c) when the minds of the parties are expressed in an unambiguous manner, the court cannot override the declared intention of the parties unequivocally expressed (*K. Appukuttam Panicker and Another v. S.K.R.A.K.R. Athappa Chettiar and Others* [1966] AIR Vol. 53, 303 Kerala); and

(d) there is no scope, at all, for drawing upon hypothetical considerations or the supposed intention of the parties when the words contained in the contract are clear and unambiguous (*The Union of India v. Kishorilal Gupta and Bros.* [1959] AIR Vol. 46, 1362 SC).

[18] I have said that the general rule is that extrinsic evidence will not be admitted to contradict or vary the clear terms of an agreement. Similarly, evidence of prior negotiations will not be accepted to explain the meaning of the ambiguous wording. It is not unusual in a case of disputed interpretation to find a party contending for his own interpretation the true construction of the words used or, in the alternative, the same party claiming rectification of the contract will insist that the court should examine closely the preceding negotiations in order to ascertain whether the agreement allows rectification. A classic example can be seen in the case of *Prenn v. Simmonds [1971] 1 WLR 1381*.

[19] But, while in cases of doubt as to the meaning of an agreement, the rule has always been that prior negotiations cannot be looked at yet the general background and surrounding circumstances of the contract can and will be taken into consideration. Indeed this seems to be the approach of Lord Wilberforce in Prenn v. Simmonds (supra) at p. 1385, citing Cardozo J's seminal "genesis and aim of the transaction" in *Utica City National Bank v. Gunn* [1918] 118 NE 607, and this was what Lord Wilberforce said:

> In my opinion, then, evidence of negotiations, or of the parties' intentions,... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

[20] Again, Lord Wilberforce in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen (Trading as H.E. Hansen-Tangen), Yngvar Hansen-Tangen (Trading as H.E. Hansen-Tangen) v. Sanko Steamship Co. [1976] 1 WLR 989*, 995, 996, aptly said:

> In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn pre-supposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[21] There is also a rule of evidence that should be mentioned here. It is this. That the whole of the contract should be examined before construing an individual part of it (per Lord Halsbury in *Glynn and Others v. Margetson & Co. and Others [1893] AC 351*, at p. 357)".

[53]I find no good reasons to depart from these principles in the present case before me. The terms of the provisions so plainly drafted in Clause 3.1 (c) and Clause 3.2 of the SPA in particular, as set out earlier, are clear and demonstrate no ambiguities that prevent the application of their plain and ordinary meaning.

[54]In an earlier decision in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357* the Court of Appeal reaffirms the principle that the Court's duty is to give effect to the bargain of the parties according to their intention. Mohd Ghazali JCA held:-

> "We are satisfied that the learned judge in the instant case applied the general principles discussed above when he decided

as he did. The intention of the parties must be ascertained from the words used in the agreement. Whichever way we look at cl 4.2 of the agreement, we are of the view that the respondent would be entitled to claim interest for the additional month plus three days even if the appellant had not breached the agreement and had completed the transaction. Our sympathies are with the appellant. The RM9m which they paid as deposit have been forfeited and, in addition to that, they have been ordered to pay interest amounting to the sum of RM776,712.33 together with interest from 21 November 1997 to date of payment. But then, the court must give effect to the plain meaning of the words of cl 4.2 of the agreement however much it may dislike the result. Under the circumstances, we see no reason to disagree with the decision of the learned judge".

[55]In view of these case law authorities, it is crystal clear that Clause 3.1 (c) of the SPA makes it imperative for the defendant to pay late payment interest for its failure to make the requisite payment of the balance purchase price within the three month period after the extension of the original free of interest completion period agreed to be extended by the plaintiff. The grant of additional time by the plaintiff must have taken into account the corresponding promise of late payment interest, as indeed in-built in Clause 3.1 (c) of the SPA.

[56]It is also plainly inaccurate to assert that no summary judgment can be entered when there exists a counterclaim by the defendant. In contrast, it is settled law that summary judgment can still be entered notwithstanding the existence of a counterclaim.

[57]This was reaffirmed by the Court of Appeal in the case of *United Trade Arena (M) Sdn Bhd & Ors v Bank Pertanian Malaysia Bhd* [2016] 2 MLJ 65 at para 28 where the decision of the High Court granting summary judgment despite the presence of a counterclaim was upheld, and the relevant passage from the judgment reads thus:-

"[28] The defendants contended that the learned judge had failed to consider the details of the counter claim and set off raised by the defendants in the present suit. The learned judge in her grounds of judgment was of the view that a summary judgment may be given despite the filing of a counterclaim and set off by the defendants. We agreed with the learned judge as it has been decided by a string of case laws that, notwithstanding the filing of a counterclaim, summary judgment may still be given (see *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423 (SC))".

[58]It is as such absolutely untenable for the defendant to have accepted and benefitted from the interest free adjusted completion period, accommodated by the plaintiff, and then from the extended completion period as well, which ended on 30 September 2020, proceeded towards the completion but given the insistence for payment of late interest, now takes the position that under Section 3.2 the completion date actually happened only after the assessment letter was furnished by the plaintiff for registration at land office purposes, much later. Nor can the argument that time was as such no longer of the essence be accorded any credence.

[59]It bears emphasis that when the plaintiff issued the letter demanding the late payment interest on 7 October 2020 soon after payment of the balance purchase price by the defendant on 30 September 2020, there were no complaints from the defendant. There were then no arguments about the alleged failure on the part of the plaintiff to

provide the assessment letter or any contention about the plaintiff having waived its right to demand for the late payment interest.

[60]Neither can the defendant argue that the plaintiff is estopped from relying on the said Clause 3.1 (c) to claim the late payment interest. Authorities such as the Canadian Superior Court of Justice in the case of *Vista Sudbury Hotel Inc (c.o.b Rainbow Value Centre) v Oshawa Group Ltd* [2018] OJ No. 916 held that estoppel would not be applicable where there is a non-waiver and entire agreement clause. As mentioned the SPA in the instant case contains Clause 24(g) on non-waiver. In addition, the English High Court case of *Constain Ltd v Tarmac Holdings Ltd* *[2017] EWHC 319* held that for estoppel to be applicable, there must have been *"a clear, unequivocal, unambiguous and unconditional promise".*

[61]In the Malaysian High Court decision in *Interstate M&E Sdn Bhd & ors v Fore-Sight Trading Sdn Bhd & Ors* *[2007] 6 MLJ 677*, Abdul Malik Ishak J (as he then was) ruled that reliance can only validly be made on estoppel if among others, there was an express or implied representation that a party will not rely on the legal rights in question and the representation must be sufficiently clear in that it is reasonably understood, in addition to that the other party must have altered its position in reliance on the representation. Clearly none can be shown in the instant case.

[62]In addition it would not be remiss of me to allude to what I had said which is of relevance to this subject in the case of *HTJ Development Sdn Bhd v Teoh Chin Kee & Anor* *[2018] MLJU 1753*, as follows:-

> "[66] The law is well established in that other than settled exceptions, subsequent conduct cannot be considered for the purpose of interpreting a written agreement (see the decision of the House of Lords case in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583* and our Court of Appeal decision in *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* *[2010] 4 MLJ 157*).
>
> [67] The importance of this rule cannot be over-emphasised. The Privy Council in the case of *Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor* *[1974] 2 MLJ 83* had already long held that an agreement cannot be construed in the light of parties' subsequent conduct especially when the instrument to be construed was in any case unambiguous. This is key. This was also recently applied by the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MJL 819."

[63]In the instant case before me, there was certainly no unequivocal representation that any alleged variation was valid; and no other evidence has been shown to truly and meaningfully provide the requisite substantiation. There were simply no written variations, let alone unequivocally made, and neither could any alleged extrinsic evidence or subsequent conduct give rise to an estoppel against the plaintiff to rely on Clause 26 (g) on the no waiver provision in the SPA.

Conclusion

[64]In view of the foregoing, I find that the defendant has failed to raise any triable issue or reasonable defence to justify its resistence to the summary judgment application by the plaintiff.

[65]Summary judgment is accordingly entered against the defendant. Enclosure 7 is therefore allowed, with costs.

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