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1. [Tan Man Hin v Judy Ng Yoke Mey \[2021\] MLJU 638](#)

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TAN MAN HIN v JUDY NG YOKE MEY

CaseAnalysis

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Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ONG CHEE KWAN JC

SUIT NO WA-22NCC-618-12 OF 2020

24 April 2021

M Rajakumaran (Ram Yogan Sivam) for the plaintiff.

David Gurupatnam (David Gurupatham & Koay) for the defendant.

Ong Chee Kwan JC:

GROUND OF JUDGMENT Introduction

[1] This is my judgment pursuant to an application for summary judgment (**'Enclosure 8'**). I found no *bona fide* defence to the Plaintiff's claims and granted judgment as prayed. Below are my grounds.

Background facts

[2] The Plaintiff and the Defendant entered into a Share Sales Agreement dated 13.7.2017 (**'the SSA'**) whereby upon the request of the Defendant, the Plaintiff agreed to sell 20,002 shares in Oxbridge Master Sdn Bhd (company No.498994-T), Lumina Ukay Development Sdn. Bhd. (Company No.752822-W) and Go Venture Sdn. Bhd. (Company No.500726-H) (**'the Shares'**) at the Purchase Price of Ringgit Malaysia Five Million (RM 5,000,000.00) (**'Purchase Price'**) to be paid by the Defendant based on the terms of the SSA.

[3] It is common ground that the Plaintiff had transferred all the Shares under the SSA to the Defendant. However, the Defendant only paid the amount of RM 1,856,849.70 towards the Purchase Price making the outstanding balance of RM 3,143,150.30 due and owing to the Plaintiff under the SSA.

[4]By Enclosure 8, the Plaintiff sought from the Defendant by way of summary application judgment for the sum of RM 3,143,150.30 arising from the Defendant's breaches and or failure and or refusal to pay the agreed instalments to the Plaintiff under the SSA.

Defendant's Defence

[5]The Defendant raised the following issues:

- i. the affidavit filed by the Plaintiff in support of Enclosure 8 is fatally defective in that the deponent had failed to state that in his belief, there is no defence to the claim as stipulated under Order 14 Rule 2(1) of the *Rules of the High Court 2012* ('**the Rules**') and to verify the facts as regards the claims required under the Rules;
- ii. the Defendant had made various payments prior to the SSA towards the payment of the Shares ('**the additional payments**') and if these additional payments were to be taken into account, the Defendant had in fact overpaid the Plaintiff rendering the claims pre-mature;
- iii. Defendant was put under duress to enter the SSA.

Court's Analysis

[6]As regards the 1st issue, learned counsel for the Defendant relied on *Chai Cheon Kam v. Hua Joo Development Sdn Bhd* [1989] 2 MLJ 422 where Haidar J (as he then was) held that in an application for summary judgment, the affidavit in support must satisfy 3 requirements, namely:

- i. it must be made by the Plaintiff or by any person duly authorised to make it and who can swear positively to the facts;
- ii. it must verify the facts of which the claim or part of a claim to which the application relates is based;
- iii. it must state the deponent's belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed.

[7]With respect to learned counsel for the Defendant, the aforesaid 3 requirements are satisfied in this case. The affidavit affirmed on 22.1.2021 filed in support of Enclosure 8 is deposed by the Plaintiff himself and at paragraphs 2, 17 and 18 of the same, the Plaintiff had made the following averments:

2. Kecuali dinyatakan sebaliknya segala fakta yang dinyatakan disini adalah benar di dalam pengetahuan saya sendiri dan daripada dokumen/rekod di dalam milikan saya yang mana saya mempunyai akses sepenuhnya

17. Saya juga setelah dinasihati oleh peguambela saya dan sesungguhnya percaya bahawa Defendant tidak mempunyai suatu pembelaan yang bermerit kepada tindakan ini.

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18. Saya menyatakan disini bahawa Defendan masih lagi berhutang dan genap masanya untuk Defendan membayar balik wang tersebut kepada Plaintiff dan sesungguhnya percaya bahawa tuntutan Plaintiff adalah disokong oleh keterangan dokumen-dokumen yang dieksibitkan diatas.'

[8]To my mind the aforesaid paragraphs satisfy the requirements (ii) and (iii) outlined above by Haidar J in **Chai Cheon Kam' s** case (*supra*).

[9]Accordingly, with respect to learned counsel for the Defendant, I am unable to accept the contention that the affidavit in support of Enclosure 8 is defective.

[10]In relation to the 2nd issue, learned counsel for the Defendant had referred this Court to numerous payments that were made by the Defendant to the Plaintiff from the period from 2.9.2010 to 21.1.2020 amounting to RM 4,184,602.70. These are the additional payments. It is the Defendant's contention that these were payments made towards the Purchase Price or ought to be set-off against the Purchase Price. This would leave a balance of RM 815,397.30 which the Defendant submitted is only due and payable on 31.12.2021, being the due date for the last instalment.

[11]The Defendant had produced her own written report together with other documents all dated between 2.9.2010 till 25.1.2017 showing payments of RM 2,250,703.04 to the Plaintiff and or his wife which the Defendant contended ought to be set-off from the Purchase Price.

[12]With respect, I am unable to accept the contention by the Defendant. My reasons are as follow:-

a. Clause 17.1 of the SSA stipulates:

'This agreement constitutes the whole agreement between the parties hereto and it is expressly declared that no variation hereof shall be effective unless made by the parties hereto in writing. The terms and conditions contained herein supersede all previous communication whether oral or written between the parties hereto in respect of the subject matter of this Agreement'

The above is commonly known as an entire agreement clause. By this clause, the Defendant is precluded from relying on any previous agreements or communication or representations made between her and the Plaintiff prior to the SSA as terms governing the SSA. The parties' obligations are to be determined only from the four corners of the SSA.

b. Clause 4.1(b) of the SSA expressly provides that the Defendant agreed to pay to the Plaintiff the Purchase Price of RM 5,000,000.00 in the following manner:

- i) the 1st instalment of RM 1,000,000.00 on or before 31.12.2017;
- ii) the 2nd instalment of RM 1,000,000.00 on or before 31.12.2018;

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- iii) the 3rd instalment of RM 1,000,000.00 on or before 31.12.2019;
 - iv) the 4th instalment of RM 1,000,000.00 on or before 31.12.2020; and
 - v) the final instalment of RM 1,000,000.00 on or before 31.12.2021.
- c. The payments of RM 2,250,703.04 between 2.9.2010 till 25.1.2017 were made even before the SSA was executed and no reference is made by the parties in the SSA regarding these payments. The Defendant is precluded from relying on these payments as payment of the Purchase Price under clause 17.1 of the SSA.
- d. By the Defendant's own chronology of payments in exhibit 'JNYM-1', the Defendant had acknowledged that only a sum of RM 1,856,849.70 had been paid by her towards the Purchase Price under the SSA and that there is an outstanding balance of RM 3,143,150.30 due and owing to the Plaintiff. The Defendant's reliance on the 'additional payments' amounting to RM 2,337,753.09 to set-off the balance of RM 3,143,150.30 due under the SSA to derive a balance of RM 815,403.21 is simply untenable. A substantial part of these payments were made even prior to the Defendant entering into the SSA to purchase the Shares. Such payments could not have been for the Shares as the parties had not even contemplated the purchase of the Shares at the time of these payments. Whilst there are a few payments in the 'additional payments' were paid *post* the SSA, these payments cannot be payments towards the SSA for the simple reason that the Defendant herself did not treat these payments as payments under the SSA in exhibit JNYM-1.
- e. Given that these 'additional payments' were made prior to the SSA, the Defendant could have included these payments in the SSA to set off from the Purchase Price if indeed these payments could be set-off from the Purchase Price for Shares. The fact that they were not shows that these payments were probably made for some other purposes and could not be set- off from the same.
- f. The 'additional payments' are based on self-serving documents unsupported by primary documents and the Defendant has not demonstrated the nexus between these 'additional payments' and the balance Purchase Price under the SSA, if any, to raise any *bona fide* triable issue.

[13] On the 3rd issue of duress, the Defendant's allegation that she had signed the SSA under duress was only raised for the first time after the commencement of this suit.

[14] The SSA was stamped by the Defendant and the stamp duty was (initially) paid by the Defendant on 15.1.2018. No allegation of duress was raised at that time. Further, the Defendant did not raise duress when she made the payment for the 1st instalment for RM 1,000,000.00 for the year 2017 and the partial instalment for the year 2018. This is consistent with the Plaintiff's contention that the issue of duress is clearly an afterthought.

[15] For completeness, learned counsel for the Defendant contended that the final RM 1,000,000.00 is only due on 31.12.2021 and by reason of the same, the Plaintiff's claim for the said sum is pre- matured.

[16]With respect, the Plaintiff's failure to pay the balance sum for the 2nd instalment of the Purchase Price and her subsequent breaches of her obligations to pay the 3rd and 4th instalments amount to a clear repudiation of the SSA which the Plaintiff is entitled to accept and thereby terminating the SSA and sue for the entire balance Purchase Price as damages.

Conclusion

[17]By reason of the aforesaid, this Court found no *bona fide* triable issues and allowed the Plaintiff's prayers under Enclosure 8 with costs fixed at RM 7,500.00 subject to the payment of allocator.

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