DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN NO: 22NCVC-112-03/2014

ANTARA

1. **TAN SU CHENG**
2. **OOI BOON SEONG**

3. **LOKE SEOK ENG**

... PLAINTIF-PLAINTIF

DAN

WUDANI BAY SDN. BHD.
(NO. SYARIKAT: 522623-V) **… DEFENDEN-**

DI HADAPAN

Y.A. TUAN GUNALAN A/L MUNIANDY

PESURUHJAYA KEHAKIMAN MAHKAMAH TINGGI

GROUNDS OF DECISION

[1] This is the Defendant' application to strike out a part of the Plaintiff's Writ and Statement of Claim ('SOC') pursuant to Order 18 Rule 19(a) and/or (b) and /or (c) and/or (d) of the Rules of Court ('ROC').

[2] The Plaintiff claimed to be a purchaser of three (3) units and the second and third plaintiffs the purchasers of one (1) unit each of serviced apartments in a proposed development project called 'Wudani Bay' brought this action seeking an Order to compel specific performance of all five sale and purchase agreements, liquidated damages under clauses 22.2 and 24.2 respectively of each agreement, liquidated damages of a sum equal to an expected investment return under a purported 5-year guaranteed rent return scheme, or, in lieu of specific performance, an alternative prayer in the Amended Statement of Claim which seeks the following orders:

(a) a declaration for the termination of the sale and purchase agreement;

(b) return of the purchase consideration purportedly paid;

(c) post-rescission (consequential) damages; and

(d) exemplary and aggravated damages;

together with the usual interest, costs and other reliefs.

Grounds of Application

[3] The Defendant relied on the following grounds in support as outlined in its submission as follows:

"1. limb (a) of O 18 r 19(1)

(i) Specific Performance

The amended Statement of Claim does not reveal a reasonable cause of action for specific performance, the plaintiffs having failed to aver in the pleading that they were and are ready, willing and able to perform the respective Sale and Purchase Agreements – a material fact and necessary element of the cause of action.

(ii) Guaranteed Rent Return @ 7% per annum

The Amended Statement of Claim does not reveal a reasonable cause of action for the respective sums calculated and claimed as special damages fallen due over a period of 5 years under the guaranteed rent scheme, in that among other points taken in the

statement of defence, the condition as pleaded by the plaintiff to found such a cause of action being (a) the completion of the project; (b) full payment of the purchase price and (c) a lease back of the serviced apartment to the defendant under the 'rental agreements' was not met when the plaintiffs instituted the action.

2. Limitation bar (limb (a), (b) and/or (c) of O 18 rule 19(1))

That each and every claim or purported claim of the plaintiffs being specific performance, liquidated damages under clls. 22.2 and 24.2 of the Sale and Purchase Agreement, special (liquidated) damages under the guaranteed rent return scheme, and (as an alternative prayer in substitution for specific performance) the refund, consequential damages and other damages etc did not accrue within the period of 6 years prior to the commencement of the action on 7.3.2014 was and is barred by section 6(1)(a) of the Limitation Act 1953."

Brief Facts

[4] I adopt the outline of basic facts derived from the pleadings as set out in the Defendant's Written Submission as follows:

> "The defendant was the developer of 'Wudani Bay' a proposed property development project launched sometime in October 2000 on a piece of development land in Daerah Rompin, Pahang of which Majlis Daerah Rompin and one Lucky Beach Development Sdn. Bhd. were respectively the registered proprietor and the beneficial owner.
>
> The development was a *sell-then-build* type where the development units or 'service apartments' as how they were described in the sale and purchase agreements were sold/bought off the drawings and building plans upon payment of 10% of the purchase price with construction and delivery of vacant possession of the building together with common facilities to follow within a 30 month completion period and upon a reciprocal promise of payment of the balance 90% of the purchase price by the individual purchasers in staggered instalments according to the milestones provided for in the sale

and purchase agreements as construction of the building progresses.

As the development was not a regulated housing scheme, the sale and purchase agreements were not required to follow and comply with any of the prescribed statutory forms and requirements as mandated under the Housing Development (Control & Licensing) Regulations 1989 of the Housing Development (Control and Licensing) Act 1966. So, on the facts, these serviced apartments were sold even before the building plans were approved by the local authority.

The plaintiffs claimed that they were severally one such individual purchaser in 'Wudani Bay' – the first plaintiff having purportedly purchased 3 units and the second and third plaintiffs one unit each between years 2000 and 2002, each of which under a separate standard sale and purchase agreement,….

Hence, according to the plaintiffs, on the basis of clls. 22.1 and 24.1, the 36 calendar months for the handing over of vacant possession of the serviced apartment unit and for completion of

the common facilities expired on 25.2.2004 (for Unit 1), 17.9.2005 (for Unit 2), 30.11.2003 (Unit 3), 25.02.2004 (Unit 4), and 17.9.2005 (Unit 5) respectively.

There was according to the plaintiffs a separate 'guaranteed rent return scheme' (GRR) by which the defendant promised them each an annual return of 7% on the purchase price and would pay the amount due to the individual purchaser under the respective 'rental agreements' of the subject serviced apartment for a continuous period of 5 years upon and after completion of the project the exact terms of which 'rental agreements' they apparently have no knowledge of and did not keep a copy. Each of the plaintiffs is claiming for the whole of the five years guaranteed rent for the respective serviced apartment units on the basis that the same had fallen due as special damages."

The Law Applicable

[5] In the Supreme Court case of Bandar Builders Sdn. Bhd.& Ors v UMBC Bhd. [1993] 3 MLJ 36, the principles governing the Court's exercise

of its powers under Order 18 Rule 19(1), Rules of the High Court, 1980 were firmly established as follows:

> "The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see AG of Duchy of Lancaster v L & NW Rly Co 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see Wenlock v Moloney & Ors 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7). The court must be satisfied that there is no reasonable cause of action or that the

claims are frivolous or vexatious or that the defences raised are not arguable."

[6] As to what constitutes a properly pleaded cause of action the Defendant cited the recent Federal Court case of Tenaga Nasional Bhd. v. Kamarstone Sdn. Bhd. [2014] 1 CLJ 207 which defined the term cause of action as follows:

> "…a factual situation, the existence of which entitles one person to obtain from the court a remedy against another" (per Lord Diplock in Letang v. Cooper [1965] 1 QB 232, 242-3)
>
> "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v. Brown* [1889] 22 QBD 128 adopting the definition found in Stroud's Judicial Dictionary 5th edn.)"
>
> "A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher M.R. in *Read v. Brown* [1888] 22 QBD 128 131) (per Gill FJ in Nasri v Mesah [1971] 1 MLJ 32)"

The Plaintiff's Contention

[7] The Plaintiff basically contended that the Defendant via this application has raised the following allegations that are devoid of any merits and not appropriate to be disposed of summarily as there are serious questions that ought to be tried by the Court:

> "(a) The Defendant's allegation that the Plaintiffs failed to name Majlis Daerah Rompin and Lucky Beach Development Sdn. Bhd. as parties in the present case.
>
> (b) The Defendant's allegation that the Plaintiffs' claims were barred by Section 6, Limitation Act, 1953.
>
> (c) The Defendant's allegation that the relief for specific performance has been barred by 'laches'."

[8] Further, that as the issues were not plain and obvious on the facts or in law it was not proper for the same to be determined in a striking out application.

Decision

[9] The numerous allegations raised by the Defendant in its Defence for this claim to be dismissed summarily without a trial have given rise to conflicting affidavit evidence and several issues that ought to be tried.

[10] Among the Defendant's allegations in support of this striking out application is that the Majlis Daerah Rompin and Lucky Beach Development were not named as parties to the suit. I concern with the Plaintiff's content that this ground is misconceived and without basis as it is established principle that a Plaintiff in commencing an action is entitled to bring an action against any party that he wishes and the action cannot be defeated only by reason of non-joinder of parties. Order 15 rule 6(1), ROC 2012 makes it clear that:

> "A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

[11] The Plaintiff cited in support the Court of Appeal case of Rajamani Meyappa Chettiar v Eng Beng Development Sdn. Bhd. & Ors [2016] 4 CLJ 510 where the same proposition of law was expressed in these terms:

> "The same issue of naming the individual tortfeasors or the relevant officer(s) who committed the tort was raised and rejected by the High Court in Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153; [2013] 7 MLJ 755. The decision has since been upheld by this court. In any event, we are in agreement with learned counsel for the plaintiff that the plaintiff's action cannot be defeated by reason only of the non-joinder of the Director of Lands and Mines Selangor as a party."

[12] In this case, the Defendant was the developer and the contractual party with the Plaintiffs who was solely responsible to construct and complete the project but had allegedly breached the contract by not delivering vacant possession within the stipulated period under the SPA. Hence, there was no necessity for a separate action against the aforesaid 2 parties bearing in mind that the Plaintiff's claim was wholly premised in the terms of the SPA which did not impose any obligation of these parties. It was also pointed out that the Defendant was the party who had collected all the payments from the Plaintiffs and should be solely liable to deliver vacant possession of the properties to the Plaintiffs.

[13] In connection with the threshold issue raised by the Defendant as to whether this claim is barred by limitation under section 6 of the Limitation Acts, 1953 ('LA') an important and noteworthy fact is that in the course of the Plaintiff's Order 81 application for specific performance the Defendant confirmed and admitted that its Representative's Letter dated 30.06.2015 was issued on its behalf but now seeks to deny this fact via a Corrective Affidavit. In principle, a litigant is not permitted to approbate and reprobate on the same issues in dispute which is what the Defendant is doing to support its defence of limitation.

[14] As to whether the applicable law on the issue of limitation is S. 6 or S. 9 of the LA, it is not only a question of law but the facts of the case have also to be considered. It cannot be doubted that this claim is on the face of the pleadings an action for the recovery of land in which case the limitation of 12 years applies by virtue of S. 9, LA. This action was commenced clearly within the 12 year time-frame from the date of accrual of the pleaded cause of action. In any event, even if the applicable law for the instant cause of action is S. 6, LA on the basis that this is purely a claim for breach of contract in respect of which the 6 year limitation applies, the Defendant had through its Rep.'s Letter dated 30.06.2015 acknowledged

the rights of the Plaintiffs to the properties. Hence, the rights of the Plaintiff are deemed to have accrued on and not before that date by virtue of S. 26, LA and accordingly, this action was commenced well within the prescribed limitation period under S. 6, LA. Therefore, the plea/defence of limitation to bar the plaintiff's claim summarily is without basis and fails.

[15] For ease of reference, S. 9, LA provides that:

> "No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

[16] In Lai Chooi v. Ho Seng Kung & Anor [2012] 1 LNS 829, the Court of Appeal dealt with the question as to what constitutes an action to recover land and held that:

> "Our view is that the cause of action in the present action is essentially an action to recover land and for specific performance of an agreement for a sale of land. Under sub-s. 9(1) of the Limitation Act 1953 the limitation period to bring an action for recovery of land is 12 years from the date of accrual of the cause of action. It had been held by the Federal Court in

the case of Nasri v. Mesah [1970] 1 LNS 85; [1971] 1 MLJ 32 that an action for specific performance of an agreement for the sale of land and for a declaration of title to land, is essentially an action to recover land, so that the period of limitation would be 12 years.

[17] As for the Defendant's allegation that the Plaintiff's claim for the relief of specific performance is barred on the ground of laches the Plaintiff has not shown that on the facts as per the affidavit evidence, this defence is sustainable.

[18] The defence of laches is founded solely on the ground that the Plaintiff had unreasonably delayed commencing the present action. Apart from the fact that there was no serious and inordinate delay in bringing this action, the Defendant has not demonstrated that it had suffered serious prejudice or had been detrimentally affected by the alleged delay. There was also the question of the Defendant having waived the defence of laches by issuing its said Rep.'s Letter to the Plaintiff acknowledging their rights as late as 30.06.2015. This claim commenced on 7.03.2014 cannot thus be considered to be defective by reason if unreasonable or inordinate delay.

[19] In their Affidavit in Reply, the Plaintiffs deposed that the reason for delay in commencing of the present action is due to the impression given by the Defendant through their Representative's Letter that the Defendant will build and deliver the Units to the Plaintiffs and they were still awaiting the Defendant's reply on the proposed settlement. It has also to be noted that at the material time the Plaintiff through their solicitors had caused letters dated 09.06.2011 and 18.01.2012 to be issued demanding vacant possession from the Defendant. It goes to show that the Plaintiffs had not slept on their rights and the proposed action was held up by the settlement negotiation with the Defendant.

[20] Mere delay does not in law constitute laches. The Plaintiffs cited the leading case of Alfred Templeton & Ors v Mount Pleasure Corp Sdn. Bhd. [1989] 1 CLJ 693 where Edger Joseph Jr. J (as His Lordship then was) in a well reasoned judgment held:

> "It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in Burroughes v. Abbott [1922] 1 Ch 86, rectification of an instrument was granted after a delay of 12 years; in Weld v. Petrie [1929] 1 Ch 33 the Court of Appeal held that a

mortgagor's redemption suit was not barred by a delay of 26 years and in Pickerring v. Lord Stamford [1795] 30 ER 787 was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in Fitzgerald v. Masters [1956] 5 CIR 420, 26 years after the cause of action arose and in Bester v. Perpetual Trustee & Co, Ltd. [1970] 33 NSWR 30, Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a defence in Equity. In 1795, in Pickering v. Lord Stamford (1795) 30 ER 787 Arden MR inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a release implied from conduct or was coupled with detriment to the defendant or a third party.

In Fitzgerald v. Masters (1965) 95 CLR 420 equitable relief was granted after an inordinate length of time had elapsed. On the

point under discussion, Dixon CJ and Fullager J at p. 433 held that there were no circumstances apart from delay for refusing relief, thereby (and in my opinion; correctly) holding that mere delay of itself cannot constitute laches. In Fullwood v. Fullwood [1878] Ch D 176, Fry J held that mere lapse of time affords no bar in Equity."

[21] The undisputed facts also raise the issue of, whether the Defendant by their own conduct had waived the defence of delay on the Plaintiffs' part. Via their Representative's Letter to the Plaintiff they replied and acknowledged the rights of the Plaintiffs. Thus, they had full knowledge then that the Plaintiffs were seeking vacant possession of the units that they had purchased.

[22] In the Defendants' affidavits no evidence was adduced that they were detrimentally affected or prejudiced by the Plaintiffs' action in filing this suit only after an unreasonable delay. As pointed out, the properties and the Land are still in the Defendant's possession and the Defendant never at all material times disposed of the Units or the land to a third party. The question of detrimental effect to the Defendant would, thus, not arise.

[23] For these reasons, it is obvious that the vital elements of the defence of laches have not been established on the affidavit evidence.

[24] Apart from laches, the Defendants contended that the claim for an order of specific performance is obviously unsustainable on the pleadings and on account of time-bar. Further that:

> "The alternative relief (as a substitution of or in lieu of specific performance) for termination by rescission, refund and post termination damages were not pleaded at all.
>
> In claiming for specific performance the plaintiffs proceeded on the footing that they had after having been confronted with a repudiatory breach on the part of the defendant elected not to accept the repudiation of the sale and purchase agreements but to insist on its performance and thereby keeping the contract on foot for specific performance. That being so, even if the material facts in support of a rescission were pleaded, the plaintiffs' pleading cannot stand for the purpose of their alternative relief for an order of declaration for the termination of the contracts by rescission and refund of the purchase price allegedly paid, the post-termination damages. The converse is the same – having elected to treat and

accept the contract as at an end an innocent party cannot at the same time pursue specific performance. So, as in here, the alternative relief for rescission, refund and post-termination consequential damages are altogether a non-starter."

[25] In support, the Defendants cited, amongst others, the Federal Court case of Lim Siew Leong & Anor v Vallipuram [1973] 1 MLJ 241 at p. 244 where Gill, FJ (as he then was) held:

> "In Mama v Sassoon AIR 1928 PC 208; 111 IC 413, which was followed by this court in Lee Hoy & Anor v Chen Chi [1971] 1 MLJ 76 in holding that the court can only award compensation in a case where the plaintiff asks for specific performance, their Lordships of the Privy Council emphasized the distinction between a claim for damages on the footing that the contract had been broken by the defendant and the breach had been accepted by the plaintiff and a claim for damages as merely an alternative to a claim for specific performance. They pointed out that in the latter case the plaintiff affirms the existence of the contract even at the date of the suit and it will not be open to him in such a case to fall back upon what they referred to as a

common law claim for damages on the footing of a breach of contract already committed by the defendant. In the present case, the plaintiff clearly elected to treat the contract as in force notwithstanding the defendants' default, so that his claim for damages (for breach of contract) was not sustainable as an independent claim."

[26] Also, the Court of Appeal case of Lim Ah Moi v. Perriasamy Suppiah Pillay [1997] 3 CLJ 637 where it was held:

"An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing, and sue for specific performance."

[27] In response to the Defendant's allegation that the Amended Statement of Claim ('ASOC') does not reveal a reasonable cause of action for the purported Annual Guaranteed Return ('AGR') of 7% per annum, the Plaintiffs contended that this allegation was frivolous as paragraph 10 of the ASOC avers that AGR at the said rate had been offered by the Defendant to the Plaintiff. This offer was alleged to be by way of a representation in the Defendant's brochure which formed part of the terms

of the SPA. In any event, this is an issue that is in dispute factually and calls for evidence to be adduced. In this regard, the Plaintiff referred to the settled law principle that a Developer/Vendor is bound by the representation made in a sales brochure and the fact that, in our case, the Defendant's catalogue had been produced as evidence but the executed tenancy agreements now in the safekeeping of the Defendant have not been disclosed to the Court for reasons unknown.

[See Malaysia Land Properties Sdn. Bhd. v. Waldorf and Winsor Joint Management Body [2014] 3 MLJ 467]

[28] Next is the issue of whether the Plaintiff's claim for 5% AGR was premature and misconceived as alleged by the Defendant. I agree with the Plaintiff's contention that this allegation appears to be contrary to the Defendant's defence of limitation on the grounds advanced, particularly that the Plaintiff's cause of action had already accrued when the stipulated date for completion under the SPA had not been complied with. According to the Plaintiff, this allegation lacks bona fides and is merely an afterthought. In my view, this allegation raises questions of fact and law that ought to be tried.

[29] Additionally, it is settled law that an application to strike out pleadings, though may be made at any stage must be made promptly and expeditiously. In this case, this application was made more than 3 months after the Court of Appeal decision to allow the appeal against this Court's decision to grant the order of specific performance ('SP') sought by the Plaintiffs on 05.01.2016. The undue delay could be regarded as an abuse of the Court process that could occasion the application being dismissed in limine.

[30] It is also settled law that the Court in exercising its power under any one of the 4 limbs in O. 8, r. 19, ROC should do so only sparingly and most importantly, in plain and obvious cases where the claim is obviously and manifestly unsustainable. In the case of Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak [2010] 4 MLH 541 [Tag N] at pages 555, the Court of Appeal held that:

> "In short, we were of the view that this was not a plain and obvious case to strike out the respondent's action summarily under O 18 r 19(1)(b) of the RHC as being scandalous, frivolous or vexatious. It was obviously not an unsustainable

> case, pure and simple. The respondent's allegations pertaining to breach of trust, conspiracy, fraud and misrepresentation were matters of facts which could only be decided at the trial and not by contest of affidavits."

[31] It is also clear that there are conflicting affidavits affirmed by the Defendants themselves on material issues which, thus, cannot be determined summarily. The Plaintiff must be afforded the opportunity to adduce evidence to resolve the disputes of facts and in view of the conflict of evidence, it is not proper to dismiss the claim summarily. This is clearly a case where the statements contained in the affidavits raise conflicts on relevant facts and issues and call for further investigation to ascertain the truth. In Eng Mee Yong & Ors. v Letchumanan [1979] 2 MLJ 212 Lord Diplock held that the guiding principles of evaluation of evidence are these:

> "Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary

documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth."

[32] In conclusion, I agree with the Plaintiff's contention that this is not a plain and obvious case for the Plaintiff's SOC to be summarily disposed of by way of pleadings and affidavits or that the impugned the part of pleaded claim is on the facts and in law wholly unsustainable, hopeless and has no prospect of success.

[33] L 68 is accordingly dismissed with costs.

Bertarikh : 29 November 2016

(GUNALAN A/L MUNIANDY)
Pesuruhjaya Kehakiman
Mahkamah Tinggi Malaya
Shah Alam

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