

Kalimantan Plantations Pte Ltd

v

Wakil diri kepada Syamsuri bin Abdullah (juga dikenali sebagai Wong Sai Kow (si mati)) & 3 Ors

High Court, Kuala Lumpur – Suit No. 22NCC-464-12-2014
Hasnah Mohammed Hashim J

June 23, 2015

Contract – Remedies – Specific performance – Non-compliance with condition precedent – Whether fit and proper case for summary judgment to be entered – Rules of Court 2012, Order 81

The plaintiff had entered into a share sale agreement with the first and the fourth defendants. The fourth defendant together with the second and third defendants are companies controlled by the first defendant. The performance of the said agreement was secured by several properties ("the said lands"), owned by the second and third defendants.

The plaintiff had pursuant to the said agreement, agreed to invest in the fourth defendant and in accordance with the terms thereof, it paid a sum of RM5,200,000 to the escrow agent named in the said agreement. Part of the monies was subsequently disbursed to the first and the fourth defendants. The fourth defendant failed to fulfill the condition precedent on or before the cut-off date stipulated in the said agreement, resulting in the plaintiff's filing of an application under Order 81 of the Rules of Court 2012 ("the ROC") for specific performance of the said agreement and for the transfer of the said lands to it or to its nominee. The application was opposed by the defendants on the ground of lack of proof that the said monies were in fact paid to the escrow agent.

Issue

Whether it is fit and proper for summary judgment to be entered against the defendants.

Held, allowing the plaintiff's application in terms

The evidence adduced, in the form of the letters exhibited as exh CKC1 in encl 22, is confirmation of payment of the said monies and the receipt of the same. There were no other issues raised that merits a full trial. In the circumstances, it would be fit and proper for summary judgment to be entered against the defendants. [see p 645 paras 13-15]

Cases referred to by the court

- Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd* [1994] 1 MLJ 239; [1994] 2 CLJ 301, HC (ref) 1
- Woolley Developments Sdn Bhd v Mikien Sdn Bhd* [2008] 3 AMR 501; [2008] 1 MLJ 585, CA (ref) 5

Legislation referred to by the court*Malaysia*

Rules of Court 2012, Order 81, Order 81 r 3 10

Justin Voon and Victor Young (Justin Voon Chooi & Wing) for plaintiff
Calvin Ng Cheng Kiat (Chur Associates) for defendants

Judgment received: July 7, 2015 15

Hasnah Mohammed Hashim J

[1] Enclosure 13 is the plaintiff's application dated January 28, 2015 pursuant to Order 81 of the Rules of Court 2012 ("the ROC") for an order for the specific performance of a share subscription agreement dated September 24, 2008 ("the SSA") and for all the defendants to provide all documents and to sign any documents which are needed (inclusive of but not limited to the documents listed in encl A of the plaintiff's notice of application dated January 28, 2015) in order to effect the transfer of several lands collectively known as "the SEU lands" to the plaintiff. 20 2

[2] The cause papers

- (a) Plaintiff's "writ terpinda" and "pernyataan tuntutan terpinda" dated December 17, 2015; 30 3
- (b) Plaintiff's "notis permohonan" dated January 28, 2015 (encl 13);
- (c) Plaintiff's "afidavit sokongan" duly affirmed by Oon Chen Yen on January 27, 2015 ("Oon's first affidavit"); 35 3!
- (d) Defendants' "afidavit jawapan" duly affirmed by Khor Chia Shiung on February 17, 2015 (Khor's affidavit);
- (e) Plaintiff's "afidavit jawapan" duly affirmed by Oon Chen Yen on March 2, 2015 (Oon's second affidavit); and 40 4!
- (f) Plaintiff's "afidavit tambahan" duly affirmed by Chong Kok Choi on March 12, 2015 (Chong's affidavit).

Background facts

[3] The plaintiff (the investor), the fourth defendant and the first defendant entered into the SSA. The second, third and fourth defendants are companies under the control of the first defendant and/or which the first defendant has interests.

[4] The second and third defendants are the registered owners of the properties which are collectively described as the SEU lands. The SEU lands are as follows:

(a) Geran 80577, Lot No. 2562, Mukim Jementah, Daerah Segamat, Johor (formerly known as Mukim Jementah CT 6654) – registered under the name of the third defendant;

(b) Geran 221284, Lot No. 11142, Mukim Tangkak, Daerah Ledang (Muar), Johor (formerly known as HS(D) 13804, Lot No. 13918, Mukim Tangkak, Daerah Ledang (Muar), Johor) – registered under the name of the second defendant;

(c) Geran 319583, Lot No. 11143, Mukim Tangkak, Daerah Ledang (Muar), Johor (formerly known as Geran 170384, Lot No. 11143, Mukim Tangkak and previously known as HS(D) 13804, Lot No. 13919, Mukim Tangkak, Daerah Ledang (Muar), Johor) – registered under the name of the second defendant; and

(d) Geran 221288, Lot No. 11144, Mukim Tangkak, Daerah Ledang (Muar), Johor (formerly known as HS(D) 13806, Lot No. 13920, Mukim Tangkak, Daerah Ledang (Muar), Johor) – registered under the name of the second defendant.

[5] Pursuant to the SSA agreement, the plaintiff agreed to invest in the fourth defendant. The SEU lands would be the security with regards to the compliance of the SSA agreement. The plaintiff had invested and paid RM5,200,000 pursuant to and in compliance with the SSA under clause 3.4 of the SSA:

(a) RM5,200,000 was paid by the plaintiff on/or about November 24, 2008 to the escrow agent identified in the SSA, Messrs Andrew TS Goh & Khairil;

(b) with the consent of all parties to the SSA agreement, RM550,000 was disbursed to the first defendant, RM4,190,000 was disbursed to the fourth defendant and RM460,000 was held by Messrs Andrew TS Goh & Khairil. The sum of RM60,000 was released to the fourth defendant by Messrs Andrew TS Goh & Khairil for the payment of stamp duty and registration fees and RM400,000 was placed in safe deposit.

Decision

[6] This application was made under Order 81 r 3 of the ROC which states that:

Unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court that there is an issue or question in dispute which *ought* to be tried or that there *ought* for some other reason to be a trial of the action, the court may give judgment for the plaintiff in the action.

[7] In *Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd* [1994] 1 MLJ 239; [1994] 2 CLJ 301, Abdul Kadir Sulaiman J (as he then was) held on p 246 (MLJ); p 305 (CLJ) that:

An application by a plaintiff under Order 81 of the RHC is similar to an application under Order 14 for a summary judgment on the ground that the defendant has no defence. It is established law that the court would exercise its discretion for summary judgment only in plain and obvious cases, i.e., that there is no bona fide defence. But if the defendant satisfies the court in such an application by the plaintiff that there is a triable issue in the matter, summary judgment will not be given to the plaintiff. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown ...

In *Alloy Automotive Sdn Bhd Sdn Bhd v Perusahaan Iroufield Sdn Bhd* at p 390, Lee Hun Hoe CJ (Borneo) had this to say on an Order 81 application for summary judgment:

"The summary jurisdiction conferred by Order 81 must be used with great care. It provides a procedure similar to Order 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial ..."

[8] Therefore, in such an application, the plaintiff must establish a prima facie case that he is entitled to judgment. Abdul Hamid Embong JCA (as he then was) in *Woolley Developments Sdn Bhd v Mikien Sdn Bhd* [2008] 3 AMR 501; [2008] 1 MLJ 585 said (at p 515 (AMR); p 605 (MLJ)):

The plaintiff in a summary judgment application first needs to establish a prima facie case that "he is entitled to judgment". The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 302; [1984] 1 CLJ (Rep) 283; [1984] 2 CLJ 220 per Seah FJ). "Ought" in Order 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.

A judge in allowing for a summary judgment under Order 81 of the RHC, does so in the exercise of his discretionary jurisdiction. He may enter a judgment for the plaintiff or allow leave to defend the action. If an appellate court finds that this discretion had been judicially exercised in the sense that he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed here. (See *Wee Choo Keong v MBf Holdings Bhd & Anor (and Another Appeal)* [1993] 2 AMR 1205; [1993] 2 MLJ 217; [1993] 3 CLJ 210; *Eng Mee Yong & Ors v Letchumanan.*)

[9] In the instant application, by the terms of the SSA, the first and fourth defendants are obliged to fulfil the condition precedent on/before the cut-off date as stipulated in clause 2.1 of the said SSA:

The investor's obligations under the agreement are conditional upon the following conditions precedent being fulfilled on or before the cut-off date ...

[10] The cut-off date is defined as being nine months from the date of the SSA which is September 24, 2008 (clause 1.1 at p 18 of Oon's first affidavit). The cut-off date is therefore on/before June 24, 2009.

[11] The condition precedent as stipulated in clause 2.1 was however, not fulfilled by the fourth defendant. Clause 3.6 of the SSA provides that in the event the conditions precedent as set out in clause 2.1 are not fulfilled by the cut-off date and the non-fulfilment is not waived by the investor, then the investor shall be entitled to effect the transfer of the SEU lands to it (re clause 3.6.1, SSA).

[12] Since the defendants failed to fulfil the conditions precedent as set out the plaintiff is entitled to effect the transfer of the SEU lands to it or its nominee pursuant to clause 3.6.1 of the SSA.

Triable issues raised by the defendants

[13] It is contended by the defendants that there is no proof that the sum of RM5.5 million was paid to the escrow agent. However, the letters exhibited as exh "CKC1" in encl 22 confirmed the payment and receipt of the said sum. The said sum was paid by the plaintiff on November 24, 2008 to the escrow agent, Messrs Andrew TS Goh & Khairil. The other issues raised by the defendants through the affidavits in reply are bare allegations and not supported with any documentary evidence.

[14] No other issue was raised by the defendants that merits a full trial.

Conclusion

[15] For all the reasons stated above, I find this to be a fit and proper case for summary judgment to be entered against the defendants pursuant to Order 81 of the ROC. Accordingly, the plaintiff's application is allowed in terms.