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Yap Khay Cheong Sdn Bhd

v

Susan George a/p TM George

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Court of Appeal – Civil Appeal No. W-02(NCvC)(W)-1605-09/2015
Rohana Yusuf, Idrus Harun and Mary Lim Thiam Suan JJCA

10 November 13, 2017

15 *Contract – Specific performance – Sale and purchase agreement ("SPA") – Undue influence – Whether SPA not signed voluntarily – Whether SPA voidable as provided under s 19(1) of the Contracts Act 1950 ("the Act") – Whether specific relief available – Whether monies paid by plaintiff was for benefit of defendant as envisaged by s 20 of the Act – Whether plaintiff entitled to be refunded by defendant – Contracts Act 1950, ss 19(1), 20*

20 The defendant was the registered proprietor of a two storey terrace house ("the property") which was charged to OCBC. Pursuant to an auction, the plaintiff who intended to purchase the property, prepared and executed a sale and purchase
25 agreement ("the first SPA"). The plaintiff duly paid an earnest deposit of RM38,000 and the balance purchase price of RM247,000. OCBC later discovered that the first SPA was in fact executed by one Tharvinder Jeet Kaur a/p Jagjit Singh ("Tharvinder") who impersonated and represented herself as the
30 defendant. Tharvinder also admitted receiving and collecting the sum of RM247,000 on behalf of the defendant. The defendant then immediately executed a deed of rescission of the first SPA and a new sale and purchase agreement ("the second SPA"). The defendant subsequently informed the
35 plaintiff via letter on her intention to not proceed to complete the second SPA on the ground that she did not sign the second SPA voluntarily and that she was threatened, forced and fraudulently misled by the plaintiff and Tharvinder into doing so. The plaintiff as such filed a claim at the High Court for specific
40 performance of the second SPA and an alternative claim for the return of the sum of RM38,000 paid as earnest deposit, the balance purchase price of RM247,000 and the pre-agreed liquidated damages of RM55,000. The High Court judge concluded that the second SPA can be vitiated as it was procured by undue influence within the meaning of s 16(1) of the Contracts Act 1950 ("the Act"). The judge also ruled that the right party to refund the monies paid to the plaintiff was Tharvinder. Hence the instant appeal.

Issues

1. Whether specific relief of the second SPA was available to the plaintiff.

2. Whether monies paid by the plaintiff towards purchase of the property ought to be returned by the plaintiff. 1

Held, allowing the appeal in part with no order as to costs

1. The High Court was correct in finding that the second SPA was not signed voluntarily by the defendant and that specific relief is not available to the plaintiff. The second SPA is voidable at the option of the defendant as provided under s 19(1) of the Contracts Act 1950. The defendant had correctly exercised her right to vitiate the second SPA and thus there was no valid contract to enforce any specific relief sought by the plaintiff. [see p 83 para 14 - p 84 para 16] 5
2. There was no privity of contract between the plaintiff and Tharvinder to enable any direct recourse against her by the plaintiff. The monies paid by the plaintiff was for the benefit of the defendant as envisaged by s 20 of the Act. The defendant did not deny that RM247,000 was paid into her account by the plaintiff. This was good enough to constitute a payment made for the benefit of the defendant pursuant to a voidable contract. The plaintiff was entitled to be refunded by the defendant. [see p 86 paras 23-26] 15

Cases referred to by the court 25

- Choo Kok Seng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165, PC (ref)
- Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35, SC (ref)
- Lee Chor Ching & Anor v Idris bin Abdul Karim (and Another Appeal)* [1998] 3 CLJ (Supp) 145, HC (ref) 30
- Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 2 AMR 2322; [1996] 1 MLJ 701, CA (foll)
- Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 AMR 448; [2010] 1 MLJ 85, CA (ref) 35

Legislation referred to by the court 40

Malaysia

Contracts Act 1950, ss 16(1), 19(1), 20

Justin Voon, Lee Chooi Peng and Wong Jyh Ling (Justin Voon Chooi & Wing) for appellant

K Kandiah and M Indrani (Mohd Latip & Associate) for respondent

Appeal from High Court, Kuala Lumpur – Civil Suit No. 22NCvC-1458-12/2012

Judgment received: March 22, 2018

1 **Rohana Yusuf JCA** (*delivering the judgment of the court*)

5 [1] The plaintiff's appeal before us is against the High Court decision which dismissed both the plaintiff's claim for specific performance of a sale and purchase agreement of a property, and the alternative claim for the return of the monies paid pursuant to the said agreement.

10 [2] We had allowed the appeal of the plaintiff in part. We affirmed the decision of the learned High Court judge on the dismissal of the prayer for specific relief. We however, allowed the alternative claim of the plaintiff for the refund of the monies made pursuant to the agreement. Consequently the defendant was ordered to repay the sum of RM285,000 to the plaintiff.

15 [3] The factual background to this appeal were these. The defendant was at the material time a registered proprietor of a two storey terrace house property known as HSD 73153, PT 21991, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor, having a postal address at No. 11, Jalan Margosa SD 10/5E, Bandar Sri
20 Damansara 52200 Kuala Lumpur ("the property"). The property was charged to OCBC.

25 [4] Tharvinder Jeet Kaur a/p Jagjit Singh ("Tharvinder") was on and off living with the defendant at that property. In evidence it was disclosed that the defendant has a close, unusually intimate relationship with Tharvinder. The defendant knew Tharvinder through Datuk DJ Dave, who is Tharvinder's brother and a friend of the defendant.

30 [5] The plaintiff is a private limited company. Around July 2011, the plaintiff saw an advertisement of an auction by OCBC Bank ("OCBC") with regard to the property. The plaintiff was interested to purchase the property. An agreement for the sale and purchase of the property was prepared by the plaintiff's solicitors
35 and executed on September 1, 2011 ("the first SPA") at an agreed price of RM550,000. Pursuant to the first SPA the plaintiff paid an earnest deposit of RM38,000, out of which RM33,896.47 was paid to OCBC to regularise the defendant's mortgage account and the balance of the earnest deposit in the sum
40 of RM4,103.53 was paid in cash. The balance purchase price of RM247,000 was paid into the defendant's Maybank account.

[6] The first SPA was purportedly executed by the defendant but as it turned out later, it was in fact executed by Tharvinder, who impersonated and represented herself as the defendant to the plaintiff, as well as to the solicitors acting for the plaintiff preparing the first SPA, Encik Lim Kean Sheng ("PW3") from Messrs KS Lim and Ong.

[7] It was only in the process of inquiring for the redemption statement that OCBC detected the signature of the letter of authorisation by the defendant differed from that in its records. OCBC requested the parties to come for

verification through the thumbprint of the defendant. On June 28, 2012, all parties were present at OCBC including Tharvinder and the defendant. Also present were the solicitors who had prepared and witnessed the execution of the first SPA, PW3, the plaintiff's representative Encik Yap Han Hem ("PW1") together with three Chinese men. It was then that the fraudulent scheme of Tharvinder was discovered. Tharvinder had admitted impersonating the defendant in executing the first SPA and had held herself out as the defendant throughout the deal.

[8] The defendant said after leaving OCBC that day, she was brought to the office of Messrs KS Lim and Ong, together with Tharvinder and PW1 and the three Chinese men. At Messrs KS Lim and Ong, the defendant executed the deed of rescission of the first SPA and also a new sale and purchase agreement ("the second SPA"). It was the plaintiff's case that even though it was fraudulently misled by Tharvinder, all parties had come to an agreement to rescind the first SPA and the defendant had agreed to enter into the second SPA on similar terms as the first SPA. The differences were only regarding the length of time and dates. The claim of the plaintiff is premised on the second SPA where all payments made pursuant to the first SPA were deemed to be performed under the second SPA.

[9] On August 22, 2012 the plaintiff however, received a letter from the defendant's solicitors informing that the defendant did not want to proceed to complete the second SPA, because she claimed she did not sign the second SPA voluntarily. According to the defendant she was threatened, forced and fraudulently misled by the plaintiff and also by Tharvinder into doing so.

[10] The defendant said she never intended to sell her only property and it was Tharvinder who had all along acted on her behalf without her knowledge or consent. When she executed the second SPA the defendant claimed that she was not in a clear state of mind and was being intimidated, threatened and forced by the plaintiff and Tharvinder to execute both the deed of rescission of the first SPA and the second SPA.

[11] The learned judge having heard the evidence of the witnesses before him, found the circumstances surrounding the execution of the second SPA very suspicious. It was the observation of the learned judge that the second SPA was executed by the defendant rather hurriedly right after the meeting at OCBC where parties adjourned to the office of Messrs KS Lim and Ong, the conveyancing solicitors who acted for the plaintiff. The learned judge accepted the evidence of the defendant who said she was in a state of confusion, not in a proper state of mind, and was overwhelmed by the presence of the plaintiff's representative Yap Han Kem (PW1) and the other three Chinese men who took her to the lawyer's office. At the office, the deed of rescission to rescind the first SPA and the second SPA were all ready for her execution. The defendant testified

1 that PW3 and Tharvinder had demanded her to execute both the documents in
rough, loud and threaten ing voice that she was forced to sign them.

5 [12] After the execution of the second SPA, another meeting was held at Messrs
KS Lim and Ong. This time the defendant sought the help of Datuk DJ Dave to
resolve the matter. The meeting was held in the presence of the defendant,
Tharvinder, Datuk DJ Dave, PW1 and PW3, where Tharvinder owned up that
10 she was the one who orchestrated the first SPA. There was a recording of that
meeting which was tendered in evidence where Tharvinder also admitted
receiving and collecting the sum of RM247,000 on behalf of the defendant.
Tharvinder agreed to pay back the amount to the plaintiff. Also in that recorded
transcript the defendant told PW3 that she was not in her proper state of mind
15 when she signed the deed of rescission and the second SPA.

20 [13] Having analysed all these evidence, the learned judge concluded that the
second SPA can be vitiated as it was procured by undue influence within the
meaning of s 16(1) of the Contracts Act 1950. The learned judge opined that the
defendant being a single lady was confused and frightened by the presence of
four or five men unknown to her, including Tharvinder directing her to execute
the deed of rescission and the second SPA. In the words of the learned trial judge
25 he found "... without a doubt that the defendant was placed in a position of
helplessness, where any decision made at the behest of the plaintiff's
representative and Tharvinder would be vitiated by reason of undue influence. It
is clear that parties were not dealing at arms length".

30 [14] We have properly scrutinised the finding of facts made by the learned judge
in concluding that the second SPA was not signed voluntarily by the defendant.
Having read the submissions and after hearing the oral submissions of both
parties before us, we were in agreement with that finding as it was a finding of
35 fact based on the oral testimonies of witnesses before him. We have no reason to
disturb a finding made upon the evidence at trial, where the trial judge being a
trier of facts has a better advantage than us. The finding was made on assessing
the relevant testimonies and substantiated by good and sound reasons which we
40 have no reason to differ from or interfere with.

[15] It is a long established principle that generally, an appellate court will not
intervene with the findings of facts made by a trial judge. Only when a trial judge
has so manifestly failed to derive proper benefit from the undoubted advantage
of seeing and hearing witnesses at the trial and in reaching his conclusion; has
not properly analysed the entirety of the evidence and relevancy of
contemporary documents which were given before him; has misapprehended
the facts and blindly applied wrong principles of law, then it is the plain duty of
an appellate court to intervene and correct the error, lest otherwise the error
result in serious injustice (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious
George Fernandez & Anor* [1989] 1 MLJ 35, *Choo Kok Seng v Choo Kok Hoe & Ors*

[1984] 2 MLJ 165, *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 AMR 448; [2010] 1 MLJ 85, *Lee Chor Ching & Anor v Idris bin Abdul Karim (and Another Appeal)* [1998] 3 CLJ (Supp) 145). 1

[16] The second SPA, since it was found by the learned trial judge to have been executed without free consent and by undue influence, is voidable at the option of the defendant, as provided under s 19(1) of the Contracts Act 1950. The defendant had correctly exercised her right to vitiate the second SPA, hence there was no valid contract to enforce any specific relief sought by the plaintiff. It was for this reason that we agreed with the learned judge that, no specific relief is available to the plaintiff. 5 10

[17] The learned judge had also dismissed the alternative prayer by the plaintiff for the refund of the monies paid pursuant to the first SPA and deemed made under the second SPA. The learned judge has ruled that the right party to refund would be Tharvinder. Hence the proper claim of the plaintiff had to be directed to Tharvinder. We however were not able to discern from the grounds of judgment of the learned trial judge as to his reason for holding so. 15 20

[18] In its statement of claim the plaintiff sought for an alternative relief for the refund of the monies paid pursuant to the first SPA which was to be treated as payment made under the second SPA. The plaintiff's alternative prayer was for the return of the sum of RM38,000 paid as earnest deposit, the balance purchase price of RM247,000, and the pre-agreed liquidated damages of RM55,000 pursuant to clause 11 of the second SPA. 25 30

[19] The payment of earnest deposit totalling RM38,000 was not in dispute. Out of this sum, RM33,896.47 was paid to OCBC to regularise the mortgage account of the defendant and the balance of RM4,103.53 was paid in cash to Tharvinder. There was also no dispute that a sum of RM247,000 was paid into the account of the defendant at Maybank. The cheque payable to the account of the defendant was passed to Tharvinder, who acknowledged receipt of the same. The defendant in fact admitted that RM247,000 was credited into her account but pleaded ignorance on what the payment was for. In her testimonies she said, Tharvinder had informed her that, it was some payment for the church and so she allowed Tharvinder to withdraw them from her account at Maybank. Tharvinder had confirmed what the defendant said and had also admitted that she had eventually withdrawn the monies from the defendant's account. 35 40

[20] This brought us to s 20 of the Contracts Act 1950 which deals with monies received under a voidable contract, caused by undue influence. It provides:

20. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any

1 such contract may be set aside either absolutely or, if the party who was entitled to
avoid it has received any benefit thereunder, upon such terms and conditions as to
the court may seem just.

5 Illustration (b) to the above section further clarifies the legal position on monies
received under such a contract:

10 Illustration (b) A, a money lender advances RM100 to B, an agriculturist, and, by
undue influence, induces B to execute a bond for RM200 with interest at 6 per cent
per month. The court may set the bond aside, ordering B to repay the RM100 with
such interest as may seem just.

15 [21] Section 20 states the legal position and the implication of avoiding a contract
for reason of undue influence. It says, a party who is entitled to set aside a
contract due to undue influence, may be ordered by the court to return the benefit
obtained under such a contract, upon terms that the court deems fit. Illustration
20 (b) to s 20 amplifies further the implication of s 20, that a person who receives
benefit under such a contract may be ordered by the court to return it on terms.

[22] On the facts of the present case, it is without a doubt that the plaintiff had
paid an earnest deposit of RM38,000 for the benefit of the defendant when her
mortgage account was regularised by that payment. The sum of RM247,000 was
25 deposited into the bank account of the defendant. The defendant as an account
holder, has sole legal control and custody of her own bank account. It is accepted
that no person can have any access to another person's account unless consented
to. In this case the defendant had allowed Tharvinder free access to her account
30 and she should be held responsible for the outcome of her action. Since she had
allowed Tharvinder to meddle with her account, in our view she cannot absolve
her responsibility by just feigning ignorance about what went on in her account.
We all know that under the normal order of the day, her bank would have
35 contacted her about an unusually large transaction or an out of the ordinary
transaction such as this. She would have been alerted and would have been
aware of the transaction with the plaintiff. While saying that the monies was
drawn out by Tharvinder, the defendant had not shown any shred of
40 documentary proof to support her version. It was also in evidence that due to
their close relationship, there was a history of events between them where the
defendant had on many occasions advanced monies to Tharvinder. In a police
report lodged by the defendant against Tharvinder, there were occasions where
Tharvinder had taken her important documents, her valuable including
jewellery. Thavinder had destroyed the defendant's documents and took her
passport etc. In relation to this withdrawal of the sum of RM247,000 the
defendant said Tharvinder took her identification card to withdraw the money at
the bank. Quite obviously, she had also allowed her identification card be kept
and used by Tharvinder.

[23] We found it clear that the monies paid by the plaintiff was for the benefit of the defendant as envisaged by s 20 of the Contracts Act 1950. The payment to OCBC had regularised the outstanding mortgage account of the defendant. The defendant did not deny that RM247,000 was paid into her account by the plaintiff. In our view that is good enough to constitute a payment made for the benefit of the defendant pursuant to a voidable contract. The testimonies of the defendant that she had allowed Tharvinder to take out that money from her account, cannot absolve her liability to return the money which was paid for her benefit under a contract which she had avoided for reason of undue influence.

[24] In relation to authorising the use of account, the decision of this court in *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 2 AMR 2322; [1996] 1 MLJ 701 would provide a useful guidance. In that case, the wife who had given a blanket authority for her husband to transact shares in her trading account was held to be responsible for the loss in that account. Likewise, in the present case, since the defendant had given Tharvinder the authority to access her account without limitation, she cannot now say she was not the one benefitting from that payment and need not return that money to the plaintiff. The defendant may have a right to claim back the monies from Tharvinder, either by bringing her as a third party to the suit by the plaintiff or to directly claim indemnity from her. In this regard, we took note that the defendant initially had brought Tharvinder as a third party in the proceedings. Tharvinder however had successfully set aside the third party order against her at the Court of Appeal. The setting aside of the third party order was made by the court with liberty to file afresh. No step however, was taken by the defendant to bring Tharvinder as a third party till the end of the trial.

[25] There was no privity of contract between the plaintiff with Tharvinder to enable any direct recourse against her by the plaintiff. The learned judge did not make clear on his reason when he said the plaintiff's recourse was against Tharvinder. We are not in agreement with the learned judge on this point.

[26] Premised on all the above reasons it is our considered view that the plaintiff is entitled to be refunded by the defendant because the monies paid pursuant to the agreement was in effect paid for the benefit of the defendant. The defendant cannot deny this. The defendant cannot absolve liability by blaming Tharvinder, because she had given blanket authority to Tharvinder and was quite happy to let Tharvinder take out the monies paid by the plaintiff without investigating properly the status of her account. Since the second SPA had been vitiated by her, the defendant cannot benefit from any payment under the second SPA. The earnest deposit of RM38,000 was obviously paid for the benefit of the defendant, out of which RM33,869.47 was paid to regularise the mortgage account of the defendant at OCBC. The other RM4,103.53 was paid to Tharvinder in cash pursuant to the first SPA.

1 [27] We therefore were not in agreement with the learned trial judge on this
issue. In our view the learned judge had erred in law in ruling that the plaintiff's
recourse is to make a claim against Tharvinder. The learned judge did not
5 consider the clear provision of s 20 of the Contracts Act 1950. The defendant
should not be allowed to keep the monies or to benefit under an agreement which
she had vitiated. For that reason, we allowed this part of the appeal and ordered
the defendant to refund the plaintiff the earnest deposit of RM38,000 and
10 RM247,000 totalling RM285,000 to be paid within 30 days from the date of this
judgment. We did not allow the claim for the pre-agreed liquidated damages of
RM55,000, since the contract was already avoided by the defendant.

We made no order as to costs.

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