

# HO KEAN PIN v MALAYAN BANKING BERHAD & ANOR

CaseAnalysis  
| [2020] MLJU 1435

## Ho Kean Pin v Malayan Banking Berhad & Anor [2020] MLJU 1435

Malayan Law Journal Unreported

HIGH COURT (PENANG)

GEORGE VARUGHESE, JC

SAMAN PEMULA NO. PA-24NCvC-250-05/2020

1 September 2020

*Tan Chia Chean (Tan & Ewe) for the Applicant.*  
*Norliza binti Ali (V M Mohan Fareed & Co.) for the Respondent.*

### George Varughese JC:

FOUNDATIONS OF JUDGMENTIntroduction

[1]Enclosure 1 is an Originating Summons filed by the plaintiff seeking orders, as follows :

- (i) that the plaintiff be given an extension of time of 50 days from the last day of the Movement Control Order (“MCO”) to complete the process of purchasing the said property;
- (ii) that following the extension of time granted by this Honorable Court under prayer (i) above, a declaration that the Memorandum of Sale dated 07/01/2020 between the 1<sup>st</sup> defendant and the plaintiff as the successful bidder for a property and hereditament known as PT No. 5138, Mukim 13, Daerah Seberang Perai Selatan, Negeri Pulau Pinang held under Suratan Hakmilik Sementara No. H.S. (D) 45378 together with a building built on it with an address for assessment 19, Lorang Cassia, 14110 Pulau Pinang (“Property”) is not cancelled and the 10% deposit of the reserve price is not forfeited by the 1<sup>st</sup> defendant;
- (iii) that this Honourable Court is allowed and authorized to sign all relevant documents including and not limited to the Order for Sale by the Court and Borang 16F;
- (iv) that the Registrar of Land Titles or any of the relevant authorities is to take action as required to give effect to this order; and
- (v) any other orders deemed fair and appropriate by this Honorable Court.

[2]The 1<sup>st</sup> defendant did not file any affidavit in reply to oppose enclosure 1. However, counsel for the 1<sup>st</sup> defendant filed written submissions on behalf of the 1<sup>st</sup> defendant in respect of this application.

[3]The 2<sup>nd</sup> defendants did not file any affidavit nor participate in the proceedings.

Brief Background

[4]The plaintiff is the successful bidder at a public auction carried out by the High Court of Penang on 07/01/2020 of the Property at an auction price of RM365,000.00 and paid 10% of the reserve price as deposit amounting to RM35,000.00.

[5]Subsequently the plaintiff secured a Term Loan facility for RM328,500.00 together with MRTA for RM3,078.00 from Malayan Banking Berhad (3813-K) at Maybank Tanjung Bungah, 2C-2G Azuria Business Centre, Jalan Lembah Permai, Tanjung Bungah, 11200 Penang (“Bank”) on 21/01/2020 for the purchase of the Property and to pay the balance purchase price before the expiry date of 06/05/2020.

[6] Clause 16 of the Conditions for Sale (see - exhibit “HKP-1 of the plaintiff’s affidavit in support), states,

*“Penawar yang berjaya hendaklah menandatangani Memorandum Jualan dan juga hendaklah membuat pembayaran baki harga belian dalam tempoh seratus dua puluh (120) hari dari tarikh jualan. Kegagalan penawar yang berjaya untuk memenuhi kedua-dua syarat tersebut akan menyebabkan jualan tersebut adalah terbatal dan wang deposit 10% daripada harga rizab akan dirampas oleh Plaintiff dan digunakan untuk menjelaskan bayaran hutang Defendan kepada Plaintiff setelah ditolak segala perbelanjaan lelongan tersebut.”*

*[Emphasis added]*

[7] Hence, the last date to pay the balance purchase price is on 06/05/2020.

[8] The government of Malaysia pursuant section 11 of the Prevention and Control of Infectious Diseases Act 1988 (Act 342) imposed the MCO for 56 days i.e phase 1 of the MCO from 18/3/2020 till 01/04/2020, phase 2 of the MCO from 01/04/2020 till 14/04/2020, phase 3 of the MCO from 14/04/2020 till 28/04/2020 and phase 4 of the MCO from 29/04/2020 till 12/05/2020 to curb the transmission of the Covid 19 virus as a safety measure for the people of Malaysia.

[9] During the MCO, the Penang Land Office, law firms and other relevant bodies were not allowed to operate from 18/03/2020 till 04/05/2020, except banking and financial institutions.

[10] As the last date to pay the balance purchase price on 06/05/2020 was during the MCO period, the sale could not be completed and the plaintiff filed this application seeking an extension of time to complete the transaction.

#### Plaintiff’s Contention

[11] The plaintiff contended that the MCO enforced by the government was beyond the control and outside the reasonable contemplation of the parties which made the performance of the plaintiff’s obligation impossible. Thus, it was unfair and prejudicial for the plaintiff to be held responsible for the non-performance of the said obligations which is due solely to the imposition of the MCO and not caused by any fault of the plaintiff.

[12] The plaintiff also contended that this is a *bona fide* application and that the plaintiff having obtained a loan from the Bank was and is, at all material times ready to pay the balance purchase price before the expiry date and had indeed taken the necessary steps to complete the purchase.

[13] However, the lodgement of a private caveat on the Property by the Bank was a prerequisite condition before the release of the loan by the Bank and the private caveat could not be lodged because the Penang Land Office was not operational during the entire duration of the MCO.

[14] The plaintiff also averred that the extension of time applied for is merely to substitute the 50 days lost as a result of the MCO.

[15] Further, the plaintiff stated that the defendants will not be prejudiced if an extension as prayed for is granted.

[16] The plaintiff urged this court to adopt the principles laid down in the Court of Appeal decisions in *Y.B. Datuk Dr Soon Choon Teck v Y.B. Datuk Robert Lau Hoi Chew & Ors* [2009] MLJU 50 and *Dato’ Tan Heng Chew v Tan Kim Hor and another appeal* [2009] 5 MLJ 790, both of which were in respect of amendments of pleadings, that

*“in considering whether any injustice would be caused, the position of the plaintiff must be balanced with the interest of the defendant”.*

[17] Thus, the plaintiff argued that in determining this application, the injustice caused to the plaintiff where the 10% reserve price paid as deposit will be forfeited if the balance purchase price is not paid within 120 days, must be considered along with the interest of the defendants. This is because the imposition of the MCO had the effect of inadvertently robbing the plaintiff of 50 days from the 120 days allowed to complete the purchase.

**[18]**The plaintiff also contended that this court has the requisite jurisdiction by virtue of section 447 (2) of the National Land Code 1965 (“NLC 1965”) in respect of saving for rules of court, and procedure in cases not provided for, and Order 92 rule 4 of the Rules of Court 2012, under the inherent powers of the court to hear this application to cure the injustice suffered by the plaintiff.

#### First Defendant’s Contention

**[19]**The 1<sup>st</sup> defendant highlighted that pursuant to the mandatory stipulation in section 257(1)(g) of the NLC 1965, there shall be no extension of time for the period of 120 days specified for the payment of the balance purchase price.

**[20]**However, the 1<sup>st</sup> Defendant left it to the discretion of the court whether or not to grant the extension sought by the plaintiff, subject to the proviso, that if an extension is granted, the same must be conditional of the following:

- i) plaintiff to obtain the consent of the chargers for the extension of time that is sought;
- ii) the interest imposed on the chargers’ account after the completion date to be paid by the plaintiff; and
- iii) plaintiff to undertake to indemnify the 1<sup>st</sup> defendant if any legal action is taken against the 1<sup>st</sup> defendant in the event the sale is set aside due to the extension sought.

#### The Law

**[21]**The relevant provision in respect of payment of the balance purchase price can be found in section 257(1)(g) of the NLC 1965, which reads,

*“specify that the balance of the purchase price shall be settled on a date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified;”*

*[Emphasis added]*

**[22]**Consequently, by virtue of section 257(1)(g) of the NLC 1965, especially in view of the word ‘shall’ used therein, *prima facie* there can be no extension for the period stipulated for the payment of the balance of the purchase price, and no legislative exception have been provided for.

**[23]**However, in *Hee Nyuk Fook v. Public Prosecutor* [1988] 2 MLJ 360, the Supreme Court, stated,

*“The question that arises is whether section 158(ii) is mandatory or directory. In our view, the word ‘Shall’ appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see Interpretation of Statutes by Bindra, ih Ed. p. 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory.”*

*[Emphasis added]*

**[24]**A similar approach was taken in *Sundarajan a/l Sokalingam v. Fredrick Indran a/l XA Nicholas o/b Perak Bar Committee (Malaysian Bar Council, intervener)* [2015] 8 MLJ 203, where it was, *inter alia*, held,

*“When a statute uses ‘shall’ prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute ...”*

Lee Swee Seng J. (as he then was), at page 214, said,

"[18] In *Sri Palmar Development & Construction Sdn Bhd v. Jurukur Perunding Services Sdn Bhd* [2010] 6 MLJ 166 at pp 172-173, the question was asked as follows:

[10] What does the word 'shall' mean? Is it more akin to and indeed amounting to a 'must' or can it be a mere 'may'? Must the word 'shall' mean a mandatory 'must' or may it mean a directory 'may'? I am reminded of the verbal exchange in Lewis Carroll's *Through the Looking Glass*:

'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master-that's all.'

[11] I agree that generally the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per Hidayatullah J in *Sainik Motors v. State of Rajasthan* AIR 1961 SC 1480. Similarly, in *State of Uttar Pradesh v. Babu Ram* AIR 1961 SC 751, Subbarao J stated:

**When a statute uses 'shall' prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.**

[12] In the Privy Council case from Nova Scotia in *Vita Food Products, Incorporated v. Unus Shipping Company, Limited* (in liquidation) [1939] AC 277, Lord Wright stated at p 293:

illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibition in *Liverpool Borough Bank v. Turner* (1860) 2 De GF & J 502 at p 507:

**No universal rule can be laid down for the construction of statute, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.**

**...Each case has to be considered on its merits.** Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

[19] In *NS Bindra's Interpretation of Statutes* (9<sup>th</sup> Ed) at p 950, it is stated that:

The ultimate rule in construing auxiliary verbs like 'may' and 'shall' is to discover the legislative intent; and the use of words 'may' and 'shall' is not decisive of its discretion or mandates. The use of the words 'may' and 'shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determining effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed."

[Emphasis added]

[25] Therefore, based on the principles laid down in the cases of *Hee Nyuk Fook* (*supra*) and *Sundarajan a/l Sokalingam* (*supra*), this court is not bound to give a strict and literal interpretation to Section 257(1)(g) of the NLC 1965, but is entitled to look into the intent of Parliament in enacting the said provision in the NLC 1965, in interpreting the same.

[26] The NLC 1965 was amended to include, *inter alia*, Section 257(1)(g) vide P.U.(B) 559/2001 which came into force on 01/12/2001. It is noted that prior to the amendment, there was no time limit stipulated in the NLC 1965 in relation to sale of property by auction. The time limit came into existence after the amendment.

[27] To ascertain the intention of Parliament, reference to the relevant parts of the Hansard i.e. the debate by

Members of Parliament in the Dewan Rakyat on 08/05/2001 in respect of the proposed amendments to the NLC 1965, reveals as follows :

At page 37

*“Dasar utama yang dicadangkan ialah memperluaskan penglibatan bank dan institusi kewangan dengan mempertanggungjawabkan mereka menerima dan menguruskan wang deposit dan keseluruhan hasil jualan tanah yang berkenaan. Prosedur lelongan awam juga diperkemaskan supaya dapat dilaksanakan dengan cepat dan lebih adil kepada tuan tanah. Untuk maksud ini, perkara-perkara penting yang dicadangkan dipinda adalah seperti berikut:-*

...

*(ii) dalam Perintah Jualan, syarat-syarat baru ditetapkan iaitu setiap orang atau badan yang ingin mengambil bahagian hendaklah mempunyai 10% daripada harga rizab sebagai deposit. Sekiranya harga bayaran sepenuhnya tidak dijelaskan pada masa lelongan, deposit akan dibayar terus kepada pemegang gadaian dan baki dibayar dalam tempoh 120 hari. Tempoh tersebut tidak akan dilanjutkan dan sekiranya bayaran tidak diselesaikan, deposit tersebut akan dirampas dan dibahagikan menurut Seksyen 267A ...*

Further at page 81,

*“Ahli Yang Berhormat bagi Machang juga telah meminta penetapan tauliah bayaran wang lelong dalam tempoh 120 hari. Sebenamya penetapan untuk 120 hari ini selipas dimuktamadkan lelong awam adalah untuk memastikan supaya orang yang menangkap lelong benar-benar orang yang ada wang dan ia tidak boleh mempermainkan lelong sesuatu harta benda. Jadi ini untuk menentukan supaya mereka yang datang untuk mendapat lelong adalah mereka yang betul-betul berhasrat untuk membeli hak milik strata ataupun harta itu.”*

*[Emphasis added]*

**[28]** Additionally, the discussions of the Dewan Negara in the Hansard dated 28/05/2001 discloses, as follows: -

*“Saya sangat mengalu-alukan beberapa pindaan yang akan memberi perlindungan kepada penggadai (charger) iaitu seorang yang telah menggadai harta kepada bank atau satu institusi dan saya tumpukan kepada borang 16H. Di dalam borang ini ada ditambahkan beberapa syarat oleh pendaftar mahkamah. Satu daripadanya memastikan satu wang pertaruhan sebanyak 10% daripada harga rizab, satu lagi kena menjelaskan bayaran itu dalam tempoh 120 hari dan kalau tidak berbuat demikian, maka deposit 10% akan di/ucuthakkan.*

*Yang paling penting bagi saya ialah seperti yang diperuntukkan di bawah 3C(2) di mana deposit ini akan dimasukkan ke dalam akaun penggadai sebagai mengurangkan faedah kepada bank sekiranya pembeli itu tidak dapat menyelesaikan bayaran itu dalam tempoh yang ditetapkan. Ini sekurang-kurangnya akan mengurangkan bebanan kepada penggadai dan saya sangat mengalu-alukan ini.”*

*[Emphasis added]*

**[29]** Thus, it is apparent that the intention of Parliament in amending the NLC 1965 to include the mandatory provisions in section 257(1)(g) is to protect the interest of the charger and to prevent any non-serious bidder from participating in and perhaps manipulating the auction.

**[30]** The courts also have always ensured that the interest of the charger is safe guarded. In *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, a case which was decided before the amendment of the NLC 1965, the Supreme Court laid down the principle that: -

*“We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard.”*

[Emphasis added]

[31] Therefore, the auction being a judicial one, the courts must make sure that the interest of both the charger and the chargee is protected and the right to be heard afforded to both parties.

#### Findings

[32] It is indeed unfortunate that the plaintiff is placed in this dire predicament due to no fault of the plaintiff but for the imposition of the MCO. However, unlike some other countries where new laws were passed to deal with issues of this nature, at the time of writing this judgment, in Malaysia new legislative provisions have yet to be enacted by Parliament to deal with a situation as in this application which is caused solely by the restrictions of the MCO.

[33] Thus, without the necessary legislative provisions, this court cannot grant any orders that would be in breach of the clear mandatory provisions of section 257(1)(g) of the NLC 1965.

[34] Nevertheless, based on the averments in the affidavit in support, the plaintiff appears to be a serious and *bona fide* bidder and has obtained a loan from a financial institution and is able to complete the sale. However, due to the enforcement of the MCO, since the operations of the relevant agencies and departments had been affected, the sale could not be completed for reasons explained earlier.

[35] Therefore, on the face of the application in enclosure 1, this appears to be a fit and proper case for this court in the interest of justice, to invoke its inherent jurisdiction to allow this application by adopting the approach taken in **Hee Nyuk Fook (supra)** and **Sundarajan a/l Sokalingam (supra)** in interpreting section 257(1)(g) of the NLC 1965.

[36] Yet, bearing in mind the intention of Parliament in enacting section 257(1)(g) of the NLC 1965 and the principles laid down in **M & J Frozen Food Sdn Bhd (supra)**, this court must also ensure that the chargers' interest is not jeopardised when deciding whether to allow the plaintiff's application in enclosure 1. Hence, it is requisite that the chargers be afforded a chance to be heard before the determination of enclosure 1.

[37] To enable the chargers/2<sup>nd</sup> defendants to avail the opportunity to address this court, the cause papers must be served on them. In this instance, the plaintiff's counsel had informed the learned Senior Assistant Registrar during case management on 08/05/2020 that the cause papers will be served on the 2<sup>nd</sup> defendants by A. R. Registered post and on 05/06/2020 informed that the cause papers have been duly served. However, when enclosure 1 was called up for hearing on 10/6/2020, no affidavit of service was filed to verify the plaintiff's counsel's assertions made to learned Senior Assistant Registrar during the case managements.

[38] The plaintiff must file an affidavit of service to prove the service of the cause papers on the 2<sup>nd</sup> defendants. As the 2<sup>nd</sup> defendants were not present during the hearing, and in the absence of an affidavit of service, I am unable to ascertain that the cause papers have indeed been served on the 2<sup>nd</sup> defendants as chargers. Consequently, I am unable to determine that the 2<sup>nd</sup> defendants have not been deprived of their right to be heard and will not be prejudiced if this application is allowed.

[39] Additionally, though it was indicated in the written submission filed by the plaintiff's counsel that the plaintiff is prepared to pay interest if the extension of time is granted, it was ambiguous as to how much interest the plaintiff is prepared to pay especially since the application and the supporting affidavit thereto in enclosure 1 is silent about the payment of interest.

[40] In order to protect the chargers' interest, clear and unequivocal provisions for the payment of interest during the period of the extension sought should be included in the application in enclosure 1, which was not the case here.

[41] Furthermore, the plaintiff also did not indicate the compliance and/or agreement to the condition stipulated by the 1<sup>st</sup> Defendant as stated in paragraph 20 above.

[42] So, even though the plaintiff will be prejudiced if an extension of time is not granted, the inherent jurisdiction of this court cannot be invoked solely in favour of the plaintiff especially since there is the issue that the interest of both the 1<sup>st</sup> and 2<sup>nd</sup> defendants may not be protected and may be jeopardised.

Conclusion

**[43]**For these reasons, enclosure 1 is dismissed with no order as to cost.

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