Yap Heng Sang v Mammoth Empire Land Sdn Bhd [2021] MLJU 2576

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HIGH COURT (SHAH ALAM)

CHOO KAH SING J

ORIGINATING SUMMONS NO BA-24NCVC-537-04 OF 2021

10 December 2021

Yap Pei Ying (Jonathan Chok Wen Yew with her) (Lie & Lee) for the plaintiff.

Loo Ying Ning (Shearn Delamore & Co) for the defendant.

Choo Kah Sing J:

JUDGMENTIntroduction

[1]The plaintiff's claims are premised on a Sale and Purchase Agreement (under Schedule H of the Housing Development (Control and Licensing) Regulations 1989) entered into between the plaintiff and the defendant dated 9.9.2011 (hereafter the 'SPA') in which the plaintiff had agreed to purchase and the defendant (as a developer) had agreed to sell a unit of property known as Parcel P08-023A with accessory parcel No. ACP08-023A (hereafter 'the property') in a housing development known as "EMPIRE RESIDENCE" for a sale and purchase price of RM1,738,800.00 (hereafter 'the SPA price').

[2]The plaintiff averred that the defendant failed to deliver vacant possession of the property on time as stipulated in the terms of the SPA. As such, the plaintiff claimed against the defendant for liquidated ascertained damages for (i) the late delivery of vacant possession of the property (hereafter 'the first claim'), and (ii) the late delivery of the common facilities serving the housing development where the plaintiff's property is situated (hereafter 'the second claim').

[3]On 1.11.2021, this Court allowed the plaintiff's claims (with adjustment). The reasons for the decision are set out as below.

Brief Facts

[4]The plaintiff's first claim is premised on Clause 25 of the SPA which states as follows:

"25 Time for delivery of vacant possession

(1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 26 within thirty-six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to deliver vacant possession of the said Parcel in the manner stipulated in clause 26 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from the day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Parcel.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel."

[5]With regard to the plaintiff's second claim, it is premised on clause 27 of the SPA which states as follows:

"27 Completion of common facilities

(1) The common facilities serving the said housing development shall be completed by the Vendor within thirty-six (36) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities."

[6]Based on clause 25(1) of the SPA, the date for delivery of vacant possession should be on or before **9.9.2014** (36 calendar months from 9.9.2011). However, on 11.8.2014, before the expiry of 36 months, the defendant obtained from the Ministry of Urban Wellbeing, Housing & Local Government an extension of six (6) months for the date of delivery of vacant possession after the expiry of the 36 months as stipulated in clause 25(1) of the SPA. Hence, the date for delivery of vacant possession was deferred to **9.3.2015** (hereafter 'the extended date').

[7]The defendant issued a Notice of Delivery of Vacant Possession dated 26.8.2020 in accordance with clause 26(1) of the SPA to inform the plaintiff to take vacant possession of the property. In the said Notice of Delivery of Vacant Possession, the plaintiff was notified that vacant possession of the property would be deemed to have

delivered by the defendant to the plaintiff should the plaintiff fail to accept delivery of vacant possession within 14 days from the date of the Notice. The plaintiff did not take vacant possession within 14 days from the said Notice. Hence, on **9.9.2020** (14 days after 26.8.2020), the property was deemed to have been delivered to the plaintiff.

[8]Based on the above facts, the plaintiff claimed liquidated damages based on clauses 25(2) and 27(2) of the SPA respectively. According to the provisions of clauses 25(2) and 27(2), the computations for the liquidated damages should be as follows:

The First Claim

The extended date of delivery of vacant possession	The deeming date for delivery of vacant possession	Total number of days delayed -from 9.3.2015 to 9.9.2020	Calculation based on 10% of SPA price = RM173,880	Amount
9.3.2015	9.9.2020	2011 days	RM173,880 x 2011/365 days	RM958,007.34

The Second Claim

The extended date of delivery of vacant possession	The deeming date for delivery of vacant possession	Total number of days delayed -from 9.3.2015 to 9.9.2020	Calculation based on 10% of the last 20% of the purchase price = RM34,776.00	Amount
9.3.2015	9.9.2020	2011 days	RM34,776.00 x 2011/365 days	RM191,601.46

(Note: Based on the plaintiff's calculation, the amounts pleaded for the first claim and the second claim are RM957,202.96 and RM191,440.59 respectively. There is a small difference of RM804.38 and RM160.87 respectively compared to the above calculation).

The Findings of this Court

[9]The defendant's counsel raised 3 contentions against the plaintiff's claims, namely (i) the plaintiff did not have locus standi to bring this claim, (ii) with regard to the plaintiff's second claim, the defendant disputed the date of delivery of common facilities was on 9.9.2020, and (iii) the computation of liquidated damages by the plaintiff has disregarded section 35 of the Temporary Measures For Reducing The Impact of Coronavirus Disease 2019 (COVID-10) Act 2020 (hereafter 'the Covid19 Act'). This Court will deal with the defendant's contentions in seriatim as below.

Locus Standi

[10]The defendant's counsel submitted that the plaintiff had irrevocably assigned his right in the SPA to the financial institution Malayan Banking Berhad (hereafter 'the Bank') pursuant to a Deed of Assignment dated 21.3.2012

(hereafter 'the DOA'). As such, the proper party to commence the present action ought to be the Bank, and not the plaintiff. The defendant's counsel relied on section 4(3) of the Civil Law Act 1956 (hereafter 'the Civil Law Act') which states as follows:

> "(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor".

[11]The defendant's counsel relied on the Federal Court decision in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 which held, inter alia, one must only examine the four conners of the instrument to determine whether the assignment in question was indeed an absolute assignment or otherwise. This legal proposition was applied in the then Supreme Court in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 CLJ 101 and *Philioallied Bank (M) Bhd v Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621, 628-9, FC.

[12]In **Nouvau Mont Dor (M) Sdn Bhd**, the apex court at p. 271 held as follows:

> "The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in clause 1 thereof …."

[13]Based on the above legal proposition, the defendant's counsel urged this Court to apply the apex court's legal proposition, and further cited the Court of Appeal decision in *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783, 802, to suggest that the plaintiff was required to obtain an instrument of reassignment from the Bank before he could commence the action in his own name.

[14]In *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97, another Federal Court decision, the apex court made a distinction between an equitable mortgage and a legal mortgage under the common law position to appreciate the nature and extent of an assignment of right, interest and benefit of an instrument for the purpose as a security for a loan. The apex court held at p. 108 as follows:

> "At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code 1965 ('the NLC'). It is true that nowhere in the said loan agreement has the word

> 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower 'shall be entitled … to obtain a discharge and release of the said lot from the lender'… Thus, we have the loan, the contractual right to repay or redeem the said land and the assignment of all 'right, title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial, provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage; …."

[15]The apex court in the above reasoning considered the assignment to be understood in the context of a security for a loan, and that it was temporary in nature pending the issuance of a separate document of title. As such, the absolute assignment must be understood in the context as a security for a loan in that the borrower has no legal estate in the land, but an equitable interest as a purchaser of the property pending issuance of the document of title, therefore under common law the loan agreement could only create an equitable mortgage, not a legal mortgage.

[16]In a recent Court of Appeal decision in *Lim Meow Khean & others v Pakatan Mawar (M) Sdn Bhd and others* [2021] 1 LNS 173, Justice Lee Swee Seng, JCA, held:

> "[35] We have no quarrel with the above principle of interpretation of a legal document (referring to cases *Nouvau Mont Dor (M) Sdn Bhd, Hipparion (M) Sdn Bhd* and *Philioallied Bank (M) Bhd*). However, where there are contemporaneous documents executed with the DOAs such as the Loan Agreements and the DOAs do make specific reference to the Loan Agreements executed, then the parties are entitled to refer to both the documents to clarify the intention of the parties should any doubt arise. It stands to reason that one document cannot be interpreted in isolation of the other for if that had been the intention of the parties then there should be no reference to all to the other document."

[17]Based on the above proposition, in the instant case, the plaintiff's DOA, particularly Section 2.02 specifically mentioned that the Facility Agreement (Loan Agreement) dated 21.3.2012 was incorporated in the DOA, and that Section 1.04 clearly stated that "pursuant to the Facility Agreement, it is agreed, inter alia, that the principal sum, interest thereon and all other moneys owing and payable by the Assignor (the plaintiff) shall be secured by this Agreement (the DOA). And, Section 5.02 stated that "at such time as there shall be issued a separate document of title to the Property, the Assignor (plaintiff) shall cause the said title to be expeditiously forwarded to the Bank to facilitate the registration of the intended charge." Clearly, the parties anticipated in the future there will be an issuance of a separate document of title to the property, and that the plaintiff will be named as the registered proprietor and the Bank will create a charge over the property under the NLC. Until the issuance of a separate document of title of the property and the registration of proprietorship of the plaintiff, the plaintiff could merely hold an equitable interest, not a legal estate in land. A fortiori, the DOA could not be an absolute assignment as it was merely intended to secure a loan, and was not intended to be an outright assignment.

[18]A plethora of cases has decided that a purchaser (as an assignor) would have the locus standi to sue the

developer (vendor) for damages for late delivery despite there being an assignment entered into between the purchaser and a bank to assign the purchaser's right, benefits and interest in the sale and purchase agreement to the bank to secure for a loan to facilitate the purchase of the property (see *Surendran Kadarwell & Ors v Hillpark Resources Sdn Bhd* [2021] 1 LNS 1142, HC; *Mammoth Empire Land Sdn Bhd v Ng Wai Heng* [2018] 1 LNS 1578; *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 2 AMR 1953, HC; *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 2 CLJ 70 HC, *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* [1999] 4 CLJ 205, HC; *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804, HC).

[19]However, there are cases which have decided otherwise (see *Chan Min Swee v Melawangi Sdn Bhd* [2000] 7 MLJ 111, 124, HC; *Golden Straits Avenue Sdn Bhd & Ors v Real Golden Development Sdn Bhd & Anor* [2016] MLJU 611, HC)

[20]This Court is of the considered view that the majority view is preferred, because under the statutory terms of the SPA (under Schedule H of the **Housing Developer (Control and Licensing) Regulations 1989**), clause 7 states as follows:

> "**7. Purchaser's right to initiate and maintain action**
>
> The Purchaser shall be entitled on his own volition in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against the *Proprietor and/or Vendor or any other person in respect of any matter arising out of this Agreement provided the Purchaser's Financier under the deed of absolute assignment is notified in writing either before or within fourteen (14) days after the action, suit or proceeding against the *Proprietor and/or Vendor or any such other person has been filed before any court or tribunal."

[21]Further section 22C of the **Housing Development (Control and Licensing) Act 1966** (hereafter 'HAD') states:

> "Notwithstanding anything contained in any written law or any rule of law, agreement, assignment or charge lawfully entered into between a homebuyer as defined in section 16A and his financier, a homebuyer shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the homebuyer and the housing developer provided the homebuyer's financier under a deed of absolute assignment is notified in writing either before or within fourteen days after the action, suit or proceeding against the housing developer has been filed before any court or tribunal."

[22]Section 22C of the HDA was amended or inserted via section 26 of the Housing Development (Control and Licensing) (Amendment) Act 2007, Act A1289, and it came into force on 12.4.2007.

[23]Clearly, since April 2007, the law has granted a purchaser the right to commence an action against a developer or the proprietor or any other person in respect of any matter arising out of the statutory sale and purchase agreement, including the claim for damages for late delivery of vacant possession, in his/her own name so long the purchaser notifies his/her financier in writing.

[24]In the present case, the plaintiff did notify the Bank, but only on 11.8.2021. The plaintiff filed his claim in April 2021, it was more than 14 days after the filing of his action. Notwithstanding the delay, the Bank did not object to the late notification. Hence, the Bank can be taken to have consented to the plaintiff proceeding with the action in his own name despite the late notification.

[25]Based on the above analysis, with greatest respect to the apex court decision in **Nouvau Mont Dor (M) Sdn Bhd** and the subsequent cases which had followed suit, the legal proposition enunciated in the apex court was diluted since when the same court in 1988 decided **Chuah Eng Khong**, and the legal proposition has been suppressed after section 22C of the HDA came into force in April 2007.

[26]For the reasons stated above, this Court has no hesitation to find the plaintiff has the locus standi to bring this action in his own name.

The date of delivery or completion of common facilities

[27]In gist, the plaintiff's counsel submitted that logically speaking the plaintiff could not have accepted the delivery of the common facilities before the delivery of vacant possession of the property on 9.9.2020. Hence, the liquidated damages for late delivery of the common facilities has to be computed until the delivery of vacant possession of the property, i.e., until 9.9.2020.

[28]The defendant's counsel submitted that the delivery of vacant possession of the common facilities was on 4.1.2016, therefore, the computation of damages for late delivery of the common facilities has to be until 4.1.2016, and not until 9.9.2020. To support her argument, the defendant's counsel referred to the Architect Certificate dated 4.1.2016 certifying the common facilities serving the plaintiff's property (P08-023A) were duly completed on 4.1.2016.

[29]Based on the plain reading of clause 27(1) of the SPA, reference was made to the *completion* of the common facilities, not the *delivery* of the common facilities. The date of completion of the common facilities was to be determined by the vendor's architect certifying the date of completion of the common facilities. Hence, the plaintiff's counsel was wrong to compute the liquidated damages from 9.3.2015 to 9.9.2020. The computation for the late completion of the common facilities ought to be from 9.3.2015 to the date of completion which was on 4.1.2016. Hence, the Court allowed the liquidated damages for the plaintiff's second claim for a reduced sum of RM28,773.57, and not the amount as claimed by the plaintiff.

The application of section 35 of the Covid19 Act

[30]The defendant's counsel submitted that in the event the defendant has to pay any liquidated damages for the late delivery of vacant possession of the plaintiff's property, the computation for the calculation of interest ought to exclude the period between 18.3.2020 and 31.8.2020 because of section 35 of the Covid19 Act. Section 35 of the Covid19 Act states as follows:

"

(1) Notwithstanding any agreement entered into between the purchaser and the developer, the period from 18 March 2020 to 31 August 2020 shall be excluded from the calculation of-

(a) the time for delivery of vacant possession of a housing accommodation; and

(b) the liquidated damages for the failure of the developer to deliver vacant possession of a housing accommodation.

(2) The developer may apply to the Minister for an extension of the period referred to in subsection (1).

(3) Upon considering the application under subsection (2), the Minister may, if the Minister is satisfied that additional time is required by the developer to deliver vacant possession, by written direction grant to the developer an extension period of up to 31 December 2020 to deliver vacant possession and such extension shall have the same effect as the period excluded in subsection (1).

(4) Notwithstanding any agreement entered into between the purchaser and the developer, if the purchaser is unable to enter into possession of occupation of a housing accommodation from the date of service of a notice to take vacant possession from the developer during the period from 18 March 2020 to 31 August 2020 or any extension period granted under subsection (3), the purchaser shall not be deemed to have taken such vacant possession."

[31]Based on the above section, therefore, the defendant's counsel submitted that the computation for the period for late delivery of vacant possession between 9.3.2015 and 9.9.2020 ought to exclude the period from 18.3.2020 to 31.8.2020 (total 167 days). In other words, the number of days delayed are from the period 9.3.2015 to 17.3.2020 and from the period 1.9.2020 to 9.9.2020.

[32]From the plain reading of the above section 35 of the Covid19 Act, this Court is of the considered view that the operative words are "the time for delivery of vacant possession" found in section 35(1)(a), and this could only be determined under clause 25(1) of the SPA. In the present case, as explained above, the time for delivery of vacant possession was supposed to be on **9.3.2015** (the extended date). However, the extended date did not fall within the exclusion period, i.e., from 18.3.2020 and 31.8.2020. Hence, section 35 of the Covid19 Act could not apply.

[33]Subsection (1)(a) must be read together with subsection (1)(b) because the conjunctive word used is "and". When both subsections are read together, the section envisages a situation where the time for delivery of vacant possession (as determined in clause 25(1) of the statutory sale and purchase agreement) had not set in before 18.3.2020, and because the Movement Control Orders (MCO) prevented the developer from completing the development which resulted in a delay and consequence liquidated damages is imposed against the developer for the delay to deliver vacant possession, such calculation of liquidated damages will exclude the exclusion period.

[34]The above meaning could be bolstered by further reading the wording in subsection (2) which allows a developer to apply to the Minister for an extension of the period referred to in subsection (1). This means in the

event “the calculation of the time for delivery of vacant possession” falls within the exclusion period, and the developer is further hampered by the imposition of MCO to deliver vacant possession during the exclusion period, the developer may ask for the exclusion period to be extended until 31.12.2020 (see subsection (3) of the Covid19 Act).

[35]The application of the exclusion period or extended exclusion period could not be meant for a situation where the time for delivery of vacant possession had set in and a developer was already in breach of its obligation to deliver vacant possession even before the Covid 19 Act came into force on 18.3.2020. The law should assist the innocent, not the one who is/was already in the wrong.

[36]In *Chin Hong Lip & Anor v Mammoth Empire Land Sdn Bhd* [2021] 1 LNS 1066, the argument of the application of section 35 of the Covid19 Act was raised by the same defendant in that case. Unfortunately, the High Court did not make a finding because the issue raised there was meant as a triable issue to defeat in a summary judgment application.

Conclusion

[38]For the reasons as stated above, this Court allowed the plaintiff’s claims after making a modification to the second claim. This Court also ordered the defendant to pay costs of RM5,000.00 (subject to allocator fees) to the plaintiff.

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