

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Lim Yee Lan, JCA; Dr. Badariah Sahamid, JCA; Kamardin Hashim, JCA

Malayan Banking Berhad v Jeuro Developments Sdn Bhd and Another

Citation: [2018] MYCA 249 **Suit Number:** Rayuan Sivil No. M-02(NCVC)(W)384-03/2015

Date of Judgment: 26 January 2018

Corporate law – Winding up – Liquidator – Proof of debt – Where a housing developer has been wound up and money in the housing development account was paid to a creditor pursuant to a court order in the winding up proceedings, does it preclude or estop the liquidator from rejecting the proof of debt from the creditor – Housing Development (Control and Licensing) Act 1966, Housing Development (Housing Development Account) Regulations 1991

JUDGMENT**Introduction**

[1] This is an appeal against the decision of the learned High Court Judge who on 10.02.2016 allowed the 1st Plaintiff's claim for a refund of RM493,899.59 by the Defendant with interest of 5% per annum from the date of judgment until full settlement thereof. The 2nd Plaintiff's claim was dismissed with costs.

Background Facts

[2] The undisputed facts are derived primarily from the learned High Court judge's "Grounds of Judgment".

[3] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[4] The 1st Plaintiff, a company incorporated under the **Companies Act, 1965** was wound up on 2.12.1998 at the Melaka High Court (companies winding up No. 28-14-1998) on the petition of a creditor. The Official Receiver (OR) was appointed the liquidator of the 1st Plaintiff.

[5] The 1st Plaintiff is a housing developer and registered owner of land held under Geran No. 1902, Lot No. 329, Pekan Klebang Seksyen III, Daerah Melaka Tengah. (“the said land”). The 1st Plaintiff was licensed to develop a housing project known as “Lagenda Condominium” (“the said project”).

[6] The 2nd Plaintiff is a director and shareholder of the 1st Plaintiff, as well as one of the guarantors of banking facilities granted to the 1st Plaintiff by the Defendant.

[7] In 1991, the 1st Plaintiff had obtained from the Defendant the following banking facilities: a bridging loan of RM2,000,000 and end finance of RM9,000,000. As security for the facilities, a charge on the said land was registered on 25.10.1991 to the Defendant. A principal guarantee dated 30.12.1991 was entered into with the 1st Plaintiff, the 2nd Plaintiff, Muhamad Shapiae bin Mat Ali, Naoki Fukushima and Takashi Miyamoto as guarantors.

[8] As security for the bridging loan, the 1st Plaintiff had charged the said land to the Defendant and executed a joint and several guarantee from all the directors in a personal capacity to the extent of RM2,000,000.

[9] The 1st Plaintiff at the material time had opened a housing development account No. 004021600154 (“the said housing development account”) with the Defendant as required under the **Housing Development (Control and Licensing) Act 1966** and Regulations. The 1st Plaintiff had also opened a current account No. 004021236229 (“the said current account”) with the Defendant.

[10] On 07.01.1994, the 1st Plaintiff commenced an action against the Defendant in the Melaka High Court civil suit No. 22-2-199, (“the 1994 suit”). Vide a Consent Order dated 13.01.1994, a sum of RM601,295.76 was withdrawn from the said housing development account and placed in a fixed deposit account with the Defendant.

[11] The 1st Plaintiff defaulted in paying the amount due on the banking facilities. The Defendant commenced an action against the 1st Plaintiff and the guarantors in the Melaka High Court civil suit No. 22-30-1995 (“the 1995 suit”). A consent judgment was entered on 08.11.1996 against the 1st Plaintiff. Interest was ordered to be charged on the judgment sum at the rate of 1% per annum above the base lending rate (BLR) and additional interest of 1% per annum.

[12] The Defendant commenced a foreclosure proceeding in the Melaka High Court originating summons No. 22-45-1998 and applied for an order for sale of the 24 units of condominium erected on the said land. Vide order dated 11.06.1998, the Court made an order for the sale of the 24 units of condominium.

[13] Subsequently there were purchasers who applied to intervene to exclude their units from the order for sale. Vide order dated 22.04.1999, the Court had ordered that the sale of 8 units be proceeded with and the rest of the units be stayed until further order.

[14] One of the units, unit No. 1-2-4 was sold at the public auction on 10.04.2000 for RM120,600.00.

[15] The Defendant as a secured creditor had filed a proof of debt dated 14.10.2008 and claimed a debt of RM1,040,068.44 from the Official Receiver as liquidator of the 1st Plaintiff.

[16] Vide a Court Order dated 4.9.2009 in the 1994 suit, the High Court ordered the sum of RM601,295.76 together with accrued interest in a fixed deposit account with the Defendant to be deposited back to the said development account and thereafter to be paid to the Official Receiver as the liquidator of the 1st Plaintiff.

[17] Vide a letter dated 7.5.2010, the solicitors of the Defendant had remitted a cheque for the amount of RM1,165,538.88 to the liquidator but the said cheque was returned to the Defendant by the liquidator on the grounds of a stay order dated 7.5.2010 that was obtained in the High Court of Malacca companies winding up action No. 28-14-1998.

[18] The Defendant had filed an amended proof of debt form dated 12.05.2010 for the amount of RM929,034.96 after taking into account the proceeds of the auction of unit 1-2-4.

[19] A Court Order dated 23.9.2010 in the Melaka High Court winding up action no. 28-14-1998, had set aside the stay order dated 7.5.2010 and ordered the liquidator to pay the sum of RM919,469.44 to the Defendant pursuant to section 7A(6) of the **Housing Development (Control and Licensing) Act, 1966** and regulation 7(i), (j) and (l) of the **Housing Development (Housing Development Account) Regulations 1991**. Accordingly, the Director General of Insolvency, Malacca on behalf of the Liquidator of the 1st Plaintiff had remitted a cheque of RM919,468.44 to be paid to the Defendant.

[20] Subsequently, the Defendant had also filed an amended proof of debt dated 12.5.2010 in respect of an amount of RM929,034.96, after taking into account the net proceeds of the sale of unit No. 1-2-4 that was received by the Defendant on 22.5.2001.

[21] The Defendant received a Notice of Rejection of the Proof of Debt by the liquidator dated 18.4.2011, pursuant to regulation 92 of the **Companies (Winding-Up) Rules 1972**, in respect of the amount of RM929,034.96 claimed by the Defendant against the estate of the 1st Plaintiff, and stating that there is an amount of RM493,899.59 which had been overpaid to the Defendant.

[22] By a letter dated 8.7.2011, the Director of Insolvency, Malacca on behalf of the Official Receiver had demanded that the Defendant pay the sum of RM493,899.59 immediately to the Insolvency Department.

The Plaintiff's Claim

[23] The Plaintiffs at the High Court had claimed the following relief:

- a) A refund of the sum of RM493,899.59 together with interest at 5% per annum from 18.4.2011 till full settlement;
- b) To account to the 1st Plaintiff within 14 days of the order, the proceeds of the auction of unit 1-

2-4 and to pay to the 1st Plaintiff the proceeds (RM120,600.00) together with interest of 5% per annum;

c) A declaration that the Defendant is not entitled to sell the 8 units by public auction;

d) A declaration that the sale of the 8 units is void;

e) Payment of the sum of RM52,500.00 for the forfeited deposits.

Issues before the High Court

[24] The following issues were raised before the High Court:

(1) Whether the Plaintiffs are entitled to the refund of the sum of RM493,899.59 as excess payment and interest on the said sum?

(2) Whether the Defendant is entitled to auction off the 8 parcels of land?

(3) Whether the liquidator's Notice of Rejection of the Proof of Debt to the Defendant is invalid?

(4) Whether the Proof of Debt has taken into account the auction proceeds of parcel 1-2-4?

(5) Whether the 1st Plaintiff has the *locus standi* to claim for the sum of RM52,500 as forfeited deposit?

Decision of the High Court

[25] A summary of the decision of the learned High Court Judge and grounds of decision are stated as follows.

[26] The 2nd Plaintiff has no *locus standi* to bring this action against the Defendant. The relief sought in this suit is for the sole benefit of the 1st Plaintiff, which is a separate entity from its shareholders. Accordingly, the 2nd Plaintiff's claim was dismissed with costs of RM5,000.

[27] The 1st Plaintiff's claim for a declaration that the auction of the 8 parcels of land was invalid was dismissed. The 1st Plaintiff had charged the said land as security for the bridging finance granted by the Defendant. At the time of the execution of the charge, the said land was vacant as the condominium units had not as yet been erected on the said land. However, the learned High Court Judge agreed with the contention of the Defendant that this issue ought to have been raised in the relevant Originating Summons (OS) No. 24-45-1998. Res judicata applies to preclude the Plaintiff from raising the matter. In any event there was no appeal against the order of 11.6.1998 pertaining to the abovementioned OS.

[28] The Notice of rejection of Proof of Debt dated 18.11.2011 ("the said notice") issued by the Director General of Insolvency to the Defendant is valid. The said notice had rejected the Defendant's claim of RM929,034.96 and had stated that an overpayment of RM493,899.59 had been

made to the Defendant. If the Defendant had disputed the amount stated, Defendant should have applied to the Court to appeal against the decision of the Liquidator within 21 days of the receipt of the said Notice, as provided for under regulations 92 and 93 of the **Companies (Winding-Up) Rules, 1972** (to be read with rule 186 of the **Bankruptcy Rules 1969**).

[29] Since the Defendant has failed to appeal against the said notice within the period stipulated, or apply for an extension of time to dispute the said Notice, the Defendant is estopped from disputing the said Notice. Accordingly, the said Notice is valid. Reference was made to the cases of **Wong David H v Timothy Seow Group Architects Pte Ltd (In Liquidation) and Another** (2007) 3 SLR 698, and **Lim Oh & Ors v Allen & Gledhill** (2001) 3 MLJ 481. Thus, the 1st Plaintiffs claim for a refund of the sum of RM493,899.59 together with interest of 5% per annum is allowed.

[30] On the issue of whether the Proof of Debt has taken into account the auction proceeds of parcel 1-2-4, the learned High Court Judge made a finding that the 1st Plaintiff was not entitled to claim the proceeds of the auction of the said unit as the amount had been accounted for in reducing the amount of the Defendant's claim from the original amount of RM1,040,068.44 to RM929,034.96 by deducting the proceeds of the auction in the amount of RM120,600.00.

[31] The 1st Plaintiff's claim for RM52,500 as forfeited deposit is dismissed. The Defendant had conducted the auction in accordance with section 256 of the **National Land Code, 1965**. There were purchasers of the condominium units who had paid deposits on the said units but had failed to pay the balance of the purchase price of the said units. The 1st Plaintiff had been lawfully divested of the said deposits. Thus the Plaintiff is not entitled to the forfeited deposit of RM52,500.00.

Grounds of Appeal

[32] The Defendant has appealed against a part of the decision of the learned High Court Judge. The Defendant's grounds of appeal may be summarised as follows.

[33] The learned High Court Judge had erred in allowing the 1st Plaintiff's claim for the refund of RM493,899.59 for the following reasons:

[34] The liquidator of the 1st Plaintiff had elected to utilise a sum of RM919,468.44 from the housing developer's account as full settlement of the amount owing to the Defendant, which amount is not considered a part of the asset of the 1st Plaintiff in liquidation pursuant to sections 7A(5) and 7A(6) of the **Housing Development (Control and Licensing) Act, 1966** and regulation 7(i) and (j) of the **Housing Development (Housing Development Account) Regulations 1991**.

[35] In making the payment to the Defendant, the liquidator had failed to reserve his right to issue a Notice of a Rejection of the Proof of Debt. Thus the liquidator is estopped from proceeding under the companies' winding up rules to issue a Notice of Rejection of Proof of Debt to the Defendant dated 23.09.2010.

[36] The payment of the amount of RM919,468,44 by the liquidator of the 1st Plaintiff to the

Defendant was made in accordance with an order of the High Court Malacca dated 23.09.2010 (“the said order”). The said order has not been set aside. Thus the order of the High Court to refund the sum of RM493,899.59 to the 1st Plaintiff is inconsistent with the said order and the 1st Plaintiff’s claim is an abuse of process of the court.

[37] The learned High Court Judge had erred in holding that the decision of the liquidator was conclusive as this is tantamount to overruling the order of the High Court dated 23.09.2010.

[38] In respect of the Defendant’s claim for interest, the learned High Court Judge had erred in law and fact in the failure to consider that the said Notice was defective and invalid as the liquidator had rejected the Defendant’s claim for interest, which is provided for pursuant to section 43(5) and (6) of the **Bankruptcy Act, 1967**. The charge on the said land was executed by the 1st Plaintiff on 25.10.1991 and the 1st Plaintiff was wound up on 02.12.1998. This was prior to the amendment in 2003. Thus the Defendant is entitled to interest as agreed in the Consent Order dated 08.11.1996.

Decision of this Court

[39] After careful consideration of learned counsels’ written and oral submissions and a perusal of the Records of Appeal, it is our unanimous decision that there are merits in this appeal which warrant appellate intervention. Accordingly we allow this appeal with costs and reverse the decision of the learned High Court Judge. The grounds of our decision are set out below.

[40] The 1st Plaintiff’s claim is essentially for a refund of monies that had been paid by the 1st Plaintiff’s liquidator to the Defendant in accordance with an order of the Court dated 23.09.2010.

[41] The central issue in this case can be stated as follows: Where a housing developer has been wound up and money in the Housing Development Account was paid to a creditor pursuant to a court order in the winding up proceedings, does it preclude or estop the liquidator from rejecting the Proof of Debt from the creditor?

[42] By an Order of the High Court, Melaka dated 23.9.2010, the Liquidator was ordered to pay a sum of RM919,469.44 to the Defendant pursuant to section 7A(5) and (6) of the **Housing Development (Control and Licensing) Act, 1966** and regulation 7(i), (j) and (l) of the **Housing Development (Housing Development Account) Regulations, 1991**.

[43] Section 7A(5) and (6) of the abovementioned Act provides that:

“(5) Subject to subsection (6)(b), all monies in the Housing Development Account and all moneys held by the stakeholder shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event-

(a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or

(b) the licensed housing developer, being a company, goes into voluntary or compulsory

liquidation.

(6) Upon the happening of any of the event referred to in subsection (5)-

(a) the monies in the Housing Development Account and moneys held by the stakeholder shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account and moneys held by the stakeholder are authorised by regulations made under this Act to be withdrawn; and

(b) any money remaining in the Housing Development Account and all moneys held by the stakeholder, after all payments have been made pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding up of a company."

[44] In addition, regulation 7(i), (j) and (l) of the **Housing Development (Housing Development Account) Regulations, 1991** provides as follows:

"7. Purposes for which monies in Housing Development Account may be withdrawn.

No monies in a Housing Development Account of a housing development shall be withdrawn by a licensed housing developer except for all or any of the following purposes:

(i) the payment of interest and such other charges to the banks or finance companies on any loan taken for the housing development;

(j) the payment of any capital sum to redeem, in full or in part, the loan for the purchase of land for the housing development in proportion to the housing accommodation that have been sold;

(l) the payment of any capital sum to redeem, in full or in part, the loan for the construction of housing accommodation in the housing development."

[45] The Consent Order in the winding-up court dated 23.09.2010 reads as follows:

"a. perintah bertarikh 07.05.2010 adalah diketepikan ("set aside")

b. dari segala jumlah (termasuk faedah terakru) yang diterima oleh Pegawai Penerima dibawah Perintah bertarikh 04.09.2009 didalam Guaman Sivil No.22-2-1994, sejumlah RM919,468.44 hendaklah dibayar kepada Malayan Banking Berhad inter alia selaras dengan s. 7A Housing Development (Control and Licensing) Act 1966 dan regulasi 7(i), (j) dan (l) Housing Development (Housing Development Account) Regulations 1991.

c. kebebasan diberi kepada Pencarum dan Syarikat untuk membuat permohonan lanjut (“the Contributory be given liberty to apply”) dan

d. tiada perintah mengenai kos.”

[46] We note that the liquidator’s rejection of the Defendant’s Proof of Debt is based in part on the amendment to section 43(5) and (6) of the **Bankruptcy Act, 1967 (Amendment Act 2003)** which capped the interest after winding up at 6% per annum. However, we agree with the Defendant counsel’s contention that the Amendment Act does not apply to this case as the charge was created on 25.10.1991 and the 1st Plaintiff was wound up in 1998, before the Amendment Act came into effect.

[47] Thus, it is clear that money in the housing development account may be utilized to pay the interest and capital sum on the bridging loan granted by the Defendant to the 1st Plaintiff. The Defendant is therefore entitled to the interest as ordered in the consent judgment dated 23.09.2010.

[48] We note further that the order abovementioned was obtained by the consent of parties in the winding-up matter. The liquidator had admitted the amount in the Proof of Debt form lodged by the Defendant. Having admitted and paid on the amount due to the Defendant, the liquidator is estopped from disputing the amount by subsequently issuing a Notice of Rejection of Proof of Debt.

[49] We find supporting authority in the case of **Malayan Banking Bhd. v Boau Yoon Fut** [2014] 9 CLJ 429 CA. The pertinent facts relate to the conduct of the Director of Insolvency (“DGI”) who did not respond promptly to the Proof of Debt (“POD”) filed by the bank as a secured creditor as to whether the DGI admitted to or rejected the POD in writing. The DGI only responded two years later recognising the bank as a secured creditor and seeking the bank’s confirmation as to whether it was willing to forego its shortfall if the full compensation sum was paid to it. The land administrator had earlier paid the compensation sum directly to the DGI. The bank then wrote to the DGI and asked that the compensation sum be paid to it. However, in a turn of events the DGI rejected the request on the premise that the bank had surrendered its security.

The Court of Appeal (at p. 440) had stated thus:

*“Given the conduct of the DGI, this, to our mind, affords a suitable case to apply the doctrine of estoppel against the DGI under the principles laid down in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Berhad* [1995] 4 CLJ 283. The conduct of the bank has been so influenced by the DGI that it will be unconscionable for the DGI to insist on his strict rights under bankruptcy law, even on the assumption that these rights are supportable on the law.”*

(See also **Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Berhad** [1995] 4 CLJ 283 FC; **Datuk Bandar Kuala Lumpur v PPKA Sdn Bhd** [2012] 3 CLJ 181.)

[50] The facts in the instant case lend stronger support to the argument of the Defendant in that the liquidator of the 1st Plaintiff and the Bank had entered into a Consent judgment in which parties had

agreed to abide by an Order of a Court. To resile from that position is not merely unconscionable, but is in effect a contravention of a subsisting order of a Court, which order has not been set aside. To allow the 1st Plaintiff to re-litigate issues to which a competent court has made a final decision would amount to an abuse of process of Court. (**Golf Park Supermarket (S) Sdn Bhd. v Hap Hing Sdn Bhd & Anor.** [1996] 2 BLJ 19).

DATED: 26 JANUARY 2018

Signed

BADARIAH BINTI SAHAMID

Judge

Court of Appeal, Putrajaya

Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Bankruptcy Act 1967 (Amendment Act 2003), Sections 43(5), 43(6)

Bankruptcy Rules 1969, Rule 186

Companies (Winding-Up) Rules 1972, Rules 92, 93

Companies Act 1965

Housing Development (Control and Licensing) Act 1966, Sections 7A(5), 7A(6)

Housing Development (Housing Development Account) Regulations

Housing Development (Control and Licensing) Regulations 1989

National Land Code 1965, Section 256

JUDGMENTS REFERRED TO:

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC

Datuk Bandar Kuala Lumpur v PPKA Sdn Bhd [2012] 3 CLJ 181

Golf Park Supermarket (S) Sdn Bhd. v Hap Hing Sdn Bhd & Anor. [1996] 2 BLJ 19

Lim Oh & Ors v Allen & Gledhill (2001) 3 MLJ 481

Malayan Banking Bhd. v Boau Yoon Fut [2014] 9 CLJ 429 CA

Wong David H v Timothy Seow Group Architects Pte Ltd (In Liquidation) and Another (2007) 3 SLR 698

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