

IN THE COURT OF APPEAL OF MALAYSIA**Coram:** David Wong, JCA; Iskandar Hashim, JCA; Hasnah Hashim, JCA**Yeoh Thiam Soon v Chan Weng Sang and 5 Others****Citation:** [2018] MYCA 296 **Suit Number:** Rayuan Sivil No. B-02(NCVC)(W)-1671-09/2016**Date of Judgment:** 30 August 2018

Contracts & commercial – Sale and purchase agreement – Extended completion period clause to discharge a charge in favour a bank subject to payment of interest for the extended time – Further extension of time – Whether further extension granted – Whether further extension of time granted subjected to payment of interest – Whether termination of the sale and purchase agreement valid

JUDGMENT**Introduction**

[1] This appeal is against the decision of the learned High Court Judge made on 5 August 2015 dismissing the Appellant's claim against the Respondents. The Appellant's claim against the Respondents is for declaratory and other reliefs including for specific performance of a Sale and Purchase Agreement dated 3.9.2012 between parties for the 45% shares held by the Respondents in a property described as P.P. 2572, Lot 6715 Seksyen 5, Bandar Teluk Panglima Garang, Daerah Kuala Langat, Negeri Selangor together with a building erected on the land having an address at Lot No. 6715, Jalan Gangsa, Teluk Panglima Garang Industrial Area, 42500 Teluk Panglima Garang, Selangor Darul Ehsan ("the said property").

[2] We had, after perusing the records of appeal and hearing and considering the written and oral submissions of learned counsels for the parties, found merits in the appeal. We unanimously allowed the appeal with costs of RM 5,000-00 to the Appellant subject to the payment of allocator. We also ordered the deposit to be refunded.

[3] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court. The background facts of this appeal are important to understand the context in which this appeal was brought.

MATERIAL FACTS

[4] The Plaintiff and his wife, Foong Wei Ching (“Foong”), are the registered owners of 7/50 share in the said property. The Defendants, on the other hand, are the registered owners of 34/50 share in the same property. On 1.11.2011, the parties executed a Trust Deed wherein the Defendants declared that they hold 23% of their 68% share in the said property on trust for the Plaintiff and Foong. By this Trust Deed, the Plaintiff and Foong held 55% (23%+32%) share in the said property. The said property was charged to OCBC Bank (Malaysia) Berhad (“the Bank”).

[5] Subsequently, Foong and the Defendants executed an Irrevocable Power of Attorney to the Plaintiff appointing him to be their attorney to execute the Memorandum of Transfer/ Deed of Assignment and all related documents in relation to the said property. On 3.9.2012, the Defendants entered into a Sale and Purchase Agreement with the Plaintiff (“SPA”) whereby the Plaintiff agreed to purchase and the Defendants agreed to sell their 45% share in the said property.

[6] Pursuant to clause 2 of the said Agreement, the Plaintiff paid to the Defendants the sum of RM 1,095,164-00 being the aggregate cash consideration towards the purchase of the said property together with interest of 10% calculated to date. Pursuant to clause 3.1 of the said SPA the balance of the cash consideration shall be deemed paid by the Plaintiff if the Plaintiff causes the charge in favour of the said Bank to be discharged on or before 31 December 2012 (“the Completion Period”).

[7] Clause 3.2 of the SPA further provides that if the Plaintiff is unable to comply with clause 3.1, the Plaintiff shall be entitled to an automatic extension of 18 months (“the Extended Completion Period”) to cause the charge to be discharged at his own cost and expense, subject to the Plaintiff paying the Defendants the following:

- (a) a sum of RM 10,000-00 per month for the period from 1 January 2013 until 30 June 2013;
- (b) a sum of RM 15,000-00 per month for the period from 1 July 2013 until 30 December 2013;
and
- (c) a sum of RM 15,000-00 per month for the period from 1 January 2014 until 30 June 2014.

[8] The Plaintiff paid the balance cash consideration and interest in the sum of RM 240,000-00 to the Defendants. On or about June 2014, the Plaintiff requested for an extension of time to discharge the charge of the said property from the Bank as an early settlement penalty would be imposed by the said Bank if the Plaintiff were to redeem the property before June 2014.

[9] It is the Plaintiff’s pleaded case that the Defendants agreed to the request for extension of time and had duly granted him the said extension. The Defendants had requested, through a person by the name of Wilson a.k.a Too Chong Hang (the 3rd Defendant), for additional interest for the months of August and September 2014. The Plaintiff contended that he had paid interest of RM 30,000-00 for the two additional months and the Defendants had acknowledged receipt of the payment.

[10] However, despite having made the payments, the Defendants failed, refused or neglected to sign

or to execute the discharge of the charge form and other transfer documents as agreed in the SPA. Instead, on 18 November 2014, the Defendants, through their solicitors, Messrs Kumar Thangaraju & Co, terminated the SPA with immediate effect.

[11] The Plaintiff sought amongst others, for a declaration that the termination by the Defendants was mala fide and wrongful in law as the Defendants had given their undertaking/ representation that an extension of time was given to the Plaintiff.

The High Court's Findings

[12] At the High Court, several issues were raised and considered by the learned trial Judge. The main issue was whether the Defendants had granted an extension of time of several months without payment of interest to the Plaintiff. According to the Plaintiff between 1.1.2013 and 30.6.2014 he had paid the Defendants interest amounting to RM 240,000-00. However, he decided not to redeem the said property from the Bank on or before 30.6.2014 as the Bank would impose a penalty for early settlement. Therefore, in order to avoid paying penalties for early settlement, the Plaintiff contacted Too Cheong Futt (the 2nd Defendant) to request for an extension of time of several months without interest to enable him to redeem the property from the Bank.

[13] The learned High Court Judge accepted that there was a request for an extension of time to discharge the charge. By the terms of the SPA the parties had never considered that the Plaintiff would require an extension beyond the Extended Completion Date. If the parties had anticipated such a situation there would have been a specific provision in the SPA for interest to be payable beyond the Extended Completion Date as her Ladyship highlighted in her grounds of judgment:

“[34] Looking at the way the said Agreement is worded, the Court is of the considered view that the parties had never considered that the plaintiff would have ever required an extension beyond the Extended Completion Date otherwise there would have been a provision for the interest that would be payable beyond the Extended Completion Date.”

[14] Furthermore, the Plaintiff was unable to produce any document to support his contention that the Defendants had agreed to give him an extension of several months free of interest. The learned High Court Judge explained in her grounds of judgment that the emails adduced as evidence showed that the Defendants had asked for payment of interest as opposed to having agreed that the extension of time granted was free of interest.

[15] In the circumstances and based on the evidence adduced, the learned High Court Judge found that that this extension given until July is with interest.

[16] The Plaintiff had not redeemed the said property from the Bank by the end of July 2014. On this issue the learned High Court Judge is of the considered view that this could easily be answered by examining the conduct of the Defendants in demanding the payment of the balance of two months' interest (August and September 2014).

[17] The payment of interest for the month of August 2014 was only paid in November of the same year. However, the interest for the month of September 2014 was never paid. In the circumstances, the learned High Court Judge concluded that the Letter of Termination dated 18.11.2014 issued by the Defendants' solicitors was lawful and valid as the extension of time given to the Plaintiff to secure the discharge of the charge was subject to payment of interest and the interest for the month of September was not paid.

[18] In summary, therefore, the High Court concluded that the Plaintiff failed to prove its case against the Defendants on a balance of probabilities for the various reliefs sought.

[19] It is contended by the Plaintiff that the Defendants had verbally given him an extension of time for July 2014 free of interest. However, the High Court found that the Plaintiff was unable to produce any document whatsoever which would show that the Defendants had agreed to give him an extension of several months free of interest.

[20] Before us learned Counsel for the Plaintiff submitted that between 1.1.2013 and 30.6.2014 the Plaintiff had paid the Defendants interest amounting to RM 240,000-00. However, the property was not redeemed on or before 30.6.2014 as expressly provided under the SPA as the Bank would have imposed a penalty for early settlement. In order to avoid the penalty for early settlement the Plaintiff had asked for extension of time without any payment of interest and contacted the 2nd Defendant for this purpose. The 2nd Defendant had informed the Plaintiff that he would relay the Plaintiff's request to the other Defendants. There was no official discussion of extension but finally the Plaintiff was granted extension until July 2014. It is the Defendant's position that they had never granted an extension of time. The full redemption of the said property was finally made by the Plaintiff on 5.9. 2014.

[21] The Plaintiff's witness, PW2, e-mailed on 2.10.2014 the discharge form to the 3rd Defendant and had stated as follows:

"Already checked with Mr. Yeoh, the interest we shall pay only up to June 2014. Please sign back the discharge request form a.s.a.p."

[22] The 3rd Defendant responded by an email on the same day demanding interest for the months of August and September 2014. Learned Counsel for the Defendants argued that the Defendants have good grounds for terminating the SPA. The contemporaneous documents clearly show that the verbal extension granted by the Defendants for the month of July 2014 was subject to interest.

[23] The Defendants had via SMS repeatedly demanded from the Plaintiff for the payment of interest in August and September 2014 and had not agreed to grant an extension of time for the redemption of the property without interest, which had been paid on 8.7.2014. Clause 9 of the SPA expressly provides that time is of the essence. Further, under the Agreement there is no requirement for a notice to terminate to be given.

The Issues

[24] The main crux of this appeal is whether the learned High Court Judge erred in law and/or in fact in deciding that the extension of time for July 2014 granted by the Defendants to the Plaintiff was subjected to the payment of interest and that the termination of the SPA is valid.

[25] The letter of termination dated 18.11.2014 from the solicitors of the Defendants (Re: page 287 CBD Vol B) sets out the grounds for termination. The relevant parts of the aforesaid letter are reproduced below:

“3. It was Expressed Condition of the Agreement in particular Clause 3 that the charge in favor of the Chargee Bank be discharged at your own cost and expense on or before 31st December 2012 (“the Completion Period”) or in 18 calendar months (“Extended Completion Period”). We have our clients’ further instruction that you have failed to discharge the charge on the said property on or before 30th June 2014. Hence you have breached a material term that goes to the root of the Agreement.

4. In the circumstances, we have our clients’ strict instruction to notify you, which we hereby do, that they are terminating the said Sale and Purchase Agreement with IMMEDIATE EFFECT. Consequently in accordance to clause 6 of the Agreement, our clients would refund the deposit sum referred to on Clause 2.1. to you in exchange for the documents executed by our Clients”.

[26] By the letter of termination the basis of the terminating the SPA was the failure of the Plaintiff to discharge the charge on or before 30th June 2014. Thus, according to the Defendants the Plaintiff has breached a material term of the SPA.

[27] The Plaintiff through his solicitors, however, responded with a letter dated 28.11.2014 (Re: page 418 CBD Vol B) and notifying that the Plaintiff did not breach the terms of the SPA as an extension of time was granted and full payment of the consideration together with interest had been made. The Defendants, by a letter dated 3.12.2014 reiterated that they have not granted any extension and requested for copies of the alleged express extension as claimed in the Plaintiff's letter dated 20.11.2014.

[28] As we have alluded the basis of the termination as stated in the letter of termination is the failure to discharge the charge on the said property on or before 30th June 2014 by the Plaintiff. As explained in evidence this could not be done as the Bank would impose an early penalty. This fact is undisputed.

[29] We observed that the termination letter did not mention that an extension of time was granted. It is an undisputed fact that the full redemption was paid by the Plaintiff on 9.9.2014 and that two months’ interest was paid. The interest for the month of August was paid sometime in November 2014 and that payment was accepted by the Defendants. The Defendants contended that they had terminated the SPA due to failure to pay the interest for September 2014 but this is not reflected in the letter of termination issued. Furthermore, based on the email dated 3.10.2014 from Wilson (the 3rd Defendant) to the Plaintiff's personal assistant, Elaine Kon (PW2), extension of time was granted to July 2014 and payment of August interest was subsequently made in November 2014.

[30] As evidenced by the emails between the parties there was an agreement to delay the payment. The Defendants knew that the Plaintiff could not redeem earlier because of the imposition of penalty by the Bank. The SMSs between the 2nd Defendant and PW2 further show that that the Extension of the Completion Time was granted without any imposition of interest. The Defendants requested for the payment of interest for the month of August and September 2014 only after the Plaintiff had redeemed the said Property from the Bank in September. The email dated 2.10.2014 confirmed that there was an agreement that no interest will be imposed:

*"Sorry, please inform him that we cannot accept. The delay is due to your site (sic) and not to our site (sic). **We are very kind for not charging you the additional interest due to delay! Please pay until September!**"*

[emphasis added]

[31] When the aforesaid email was sent the Plaintiff had in fact paid the interest for the month of July. In submission learned counsel for the Plaintiff argued that the Plaintiff had in fact paid the two months' interest that is for the months of August and September 2014. The payment made by the Plaintiff to the Defendants on 8.7.2014 was the interest for the month of August 2014 whilst the payment on 11.11.2014 was for the month of September 2014.

[32] On 14.11.2014 the 3rd Defendant sent a message to PW2 enquiring about the one month's interest. PW2 responded and notified the 3rd Defendant that the interest had been paid and banked into the Defendants' bank account. There was no further email or correspondence with regard to the issue of interest between the parties after this message.

[33] Despite having received the payment of interest for the month of September the Letter of Termination merely states that the reason for the termination was due to the failure of the Plaintiff to discharge the charge on the said Property on or before 30 June 2014 as agreed in the SPA. Thus, it is contended by the Defendants, the Plaintiff had breached a material term that goes to the root of the said Agreement. The question that needed to be determined is whether the Letter of Termination can stand as there was the oral evidence of DW1 himself that the Defendants had granted an extension of time until September 2014 and had also collected 2 months' interest amounting to RM 30,000-00.

[34] The 3rd Defendant in his email dated 10.9.2014 had stated that the Defendants would not sign the discharge request form if the Plaintiff had not settled the overdue interest. However, in paragraph 22 of the Amended Defence dated 30.6.2015, it was pleaded that the reason why the Defendants had refused to sign the discharge request form and issued the Letter of Termination was because the said Agreement dated 3.9.2012 had lapsed. In cross-examination the 3rd Defendant had testified that both reasons were correct.

[35] It appears that the learned judge misappreciated the facts and the evidence before her. In particular, the existence of the oral agreement between the Plaintiff and the Defendants to extend the completion date without the imposition of interest. Had the learned High Court Judge properly

considered the evidence in their proper perspective she could not have come to the conclusion which she did that the termination by the Defendants was valid as the Plaintiff did not pay interest for the months of August and September 2014.

Conclusion

[36] Having considered the decision of the learned High Court Judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we were of the respectful view that there was an appealable error that had been shown by the Plaintiff that could properly justify an appellate intervention. We found that the findings of the High Court Judge were against the weight of all the evidence that was before her.

[37] For the reasons we discussed above, we were constrained to hold that the learned High Court Judge had failed to judicially appreciate the evidence and/or the law presented before her so as to render her decision plainly wrong and upon curial scrutiny, it merited our appellate intervention.

[38] For the foregoing reasons, we unanimously allowed the appeal with costs in the sum of RM 5,000-00 subject to payment of allocator fees. We also set aside the orders of the High Court and we further ordered that the deposit be refunded.

[39] We further made consequential orders as sought in prayer 34 (1)(a),(c) and (f) of the Statement of Claim. Interest for the month of September 2014 to be refunded by the Respondents to the Appellant on or before 11th May 2018.

HASNAH BINTI DATO' MOHAMMED HASHIM

Judge

Court of Appeal, Malaysia

Putrajaya

Date: 30th August 2018

COUNSEL

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