OOI CHEK CHAI & 1 ORS v. LOH THOW YOONG SDN BHD
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMAD J
GUAMAN SIVIL NO. 22-71-96
31 OCTOBER 1996
[1996] 1 LNS 542

Case(s) referred to:

1. Erinford Properties Ltd. v. Cheshire County Council [1974] 2 All ER 448.

2. Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783; [1995] 3 AMR 2559.

Counsel:

PEGUAMBELA DAN PEGUAMCARA

1. En. Mureli Navaratnam (Tetuan Ghazi & Lim), En. Abu Bakar bin Hj. Mohd. Sidek bersama-samanya, bagi pihak Plaintif.

2. Cik Karin Lim Ai Ching (Tetuan Presgrave & Matthews), F En. Dominic Filial bersama-samanya, bagi pihak Defendan.

JUDGMENT

(Lampiran 14)

By a Summons in Chambers (Enclosure 14), the Second Plaintiff prayed for an injunction to restrain the Defendant from making any dealing or transaction regarding the land in question until the hearing and disposal of the appeal to the Court of Appeal or the trial of the action.

I dismissed the application on 27th August 1996. Prior to that the Plaintiffs had applied for an order that the private caveats entered by them on the lands be extended. I had dismissed that application on 22nd July 1996. The Plaintiffs appealed to the Court of Appeal which is now pending. Immediately after I gave my decision, learned Counsel for the Plaintiffs orally applied for a stay of execution. I dismissed that application. About two weeks later the Second Plaintiff filed this application for injunction.

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An interesting question has arisen over the nature of this application. Learned Counsel for the Second Plaintiff said that the injunction prayed for is an Erinford Injunction, being an injunction pending appeal. On the other hand learned Counsel for the Defendant said that it is not an Erinford injunction because an Erinford injunction is only available if the original order prayed for, which was dismissed by the Court and against which the appeal is pending, was an application for an injunction. In this case that application was for extension of caveats.

If we look at the case of *Erinford Properties Ltd. v. Cheshire County Council*[1], the case from which the injunction got its name, it is clear that Megarry J., in that case granted the injunction pending an appeal against his dismissal of an application for an interlocutory injunction.

However, I decide to approach this application as an application for an interlocutory injunction for the following reasons. First, because the earlier application was not an application for an interlocutory injunction and I had not considered that application as such. Of course the tests in an application for an interlocutory injunction and for an extension of a caveat are in some ways similar, but they are not exactly the same. For example in an application to extend the caveat, the Court does not have **[Page 3]** to consider the sufficiency of undertaking as to damages. Secondly, the injunction prayed for by the Plaintiff is "until the disposal of the appeal to the Court of Appeal or the trial of the action." The second limb is clearly for an interlocutory injunction.

However, there is another point which causes some difficulty. That is this: there had been an application for extension of caveat which I had dismissed. There had been an application for stay of execution which I had dismissed. In the application for extension of caveat, I had considered whether there were serious issues to be tried and the balance of convenience. These issues will crop up again in this application, if, as I do, I treat this application as an application for an interlocutory injunction. In the application for stay of execution I had considered the merit of the appeal and whether, if the order was not stayed, the appeal, if successful would be rendered nugatory. These same issues will have to be considered again if I were to treat this application as an application for an Erinford injunction. In the circumstances, learned counsel for the Defendant argued that "the issue of Res Judicata in the wider sense would apply i.e. a party is estopped from raising in a subsequent proceeding same issues that were raised and issues estoppel also applies to such issues which might have been but were **[Page 4]** not brought forward." She referred to *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783*; [1995] 3 AMR 2559.[2].

There are merits in this argument. But, learned counsel for the Plaintiff pointed out that he had no choice but to make this application because even if a stay was granted the two months period given by the Registrar to the Plaintiff to obtain a Court order extending the caveat would have expired anyway as the application for extension of caveat had been dismissed and there is nothing to prevent the Defendant from disposing the lands pending appeal; the Defendant may dispose of the lands and the appeal even if successful, will be rendered nugatory. I must admit that there are merits in this argument too.

Indeed, on a hindsight, I wonder whether stay of execution was a suitable order to apply for in this case. A stay of execution is a suitable order where the Court gives judgment for a

Plaintiff requiring a Defendant to do something within a certain time, e.g. to deliver vacant possession. In that situation, the effect of the stay order is that the Defendant does not have to deliver vacant possession yet. But where, as in this case, the application was for an extension of caveat and it was dismissed, what is there to stay? The stay, even if it was granted, would not have the effect of extending the caveats.

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In the circumstances, I think it is better for me not to decide this application on the question of issue estoppel only but to consider it on merits as I should in an application for an interlocutory injunction.

So, the first question is whether there are serious issues to be tried. I had considered and decided on this issue earlier when I heard the application for extension of caveat. I have also given a written judgment. I do not wish to repeat. I adopt it as I am still of the same view: that there are no serious issues to be tried.

However, if I am wrong, I will now consider the question whether damages is an adequate remedy. Of course the subject matter is land and the Plaintiff's action is for specific performance of an alleged sale and purchase agreement. Normally, in such a case, damages would not be an adequate remedy. But in this case the Plaintiff is a mere RM2.00 company. As early as 29th March 1995, one day after the option expired, the Second Plaintiff had already assigned the purchase to another party. The draft Sale and Purchase Agreement exhibited by the Second Plaintiff (Enclosure 7) leaves the Purchaser's name blank. It shows that even before the option was exercised the Second Plaintiff had already agreed to sell the land yet to be purchased to a third party. It only shows that the intention of the Second Plaintiff was not to keep the land but to sell it at a profit.

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If I am wrong again, let me consider the balance of convenience. The Second Plaintiff cannot run from the fact that it is a RM2.00 company trying to purchase lands at a price of RMS,695,470.00. The Defendant is the registered owner of the land. Of course, there is nothing wrong for a RM2.00 company doing business if other people are willing to do business with it. But in considering the balance of convenience in order to decide whether an injunction should be granted or not, the court is fully entitled to take that into consideration. After all this is an discretionary remedy. If the Plaintiffs finally succeed in their action, well and good. But if they fail, I do not see how the Defendant is going to recover the damages suffered for not being able to deal with its land worth millions of Ringgit? The Defendant might not even be able to recover its costs. In the circumstances, I am of the view that the balance of convenience is in favour of the Defendant. This is not a case in which the Court should exercise its discretion to grant an interlocutory injunction.

Finally, assuming I should consider this application as an application for an Erinford Injunction (which as I have said I think I should not), first, I had already in the earlier application held that there were no triable issues. The higher court may or may not agree with me. I **[Page 7]** should not, in all honesty, say that there are no merits whatsoever in the appeal. How am I to judge my own judgment? Indeed, every time I am confronted with the question (for example, in an application for stay of execution) whether there are merits in the appeal against my own judgment, I find it a real embarrassment having to make a decision. It

goes against the basic principle that a person cannot be his own judge. It is well and good for the Appellate Court, even by looking at the appeal at face value, to say that there are merits or no merits. But how is a trial judge going to say that about his own judgment? Would a trial judge not be too presumptious or even arrogant to brush aside an appeal against his decision as having no merit? Humility being the cornerstone of our (at least, my culture) I am not prepared to say that there are no merits in the appeal.

However, I do not think the appeal, if successful would be rendered nugatory. The appeal is against my refusal to extend the caveat. If successful, the caveat will be extended and restored.

The test here is also similar to the application for a stay of execution which I have heard and dismissed. There is no evidence that the Defendant is disposing of the property to render the appeal nugatory. The intention of the Second Plaintiff in wanting to purchase land, as I have **[Page 8]** said, clearly appears to be for the purpose of re-selling for a profit. I do not think the Second Plaintiff is in a position to honour its undertaking, indeed I do not think the people behind the company would want to pump in their money into the company to honour the company's undertaking as to damages after the Company had lost the case, if that happens. Most likely they will just abandon it and let the Defendant wind it up, which is not worthwile. The same people can form another company another day. I have seen too many of such things. Indeed, I always wonder whether our Companies Law should be tightened to prevent such abuses.

In conclusion, I am of the view that this is not a proper case for the Court to exercise its discretion to grant an injunction, be it an interlocutory injunction or an Erinford injunction. I dismissed the application with costs.

Dato' Abdul Hamid bin Hj. Mohamad

Hakim Mahkamah Tinggi

Pulau Pinang.

PEGUAMBELA DAN PEGUAMCARA

1. En. Mureli Navaratnam (Tetuan Ghazi & Lim), En. Abu Bakar bin Hj. Mohd. Sidek bersama-samanya, bagi pihak Plaintif.

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SENARAI KES YANG DIRUJUK

1. *Erinford Properties Ltd. v. Cheshire County Council* [1974] 2 All ER 448.

2. *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783*; [1995] 3 AMR 2559.

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