

TAN SRI ABDUL AZIZ BIN ZAIN & 2 ORS v. UNITED OVERSEAS LAND LTD
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMAD J
GUAMAN SIVIL NO: 22-265-95
19 JUNE 1997
[1997] 1 LNS 274

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ALASAN PENGHAKIMAN

This action was filed in the Kuala Lumpur High Court in May 1990. After a number of applications were made and heard in Kuala Lumpur, on 22nd February 1995, the Federal Court confirmed the decision of the High Court transferring the case to this Court to be heard together with two other suits i.e. No: 22-48-91 and No: 22-165-91. The case was given a new number i.e. No: 22-265-95, the present number.

On 21st May 1996, the Plaintiff, filed this Summons-in-Chambers (Enclosure 8) to amend their Statement of Claim. This application was allowed by the Senior Assistant Registrar on 9th January 1977. The Defendants appealed to Judge-in-chambers (Enclosures 18 and 16). I allowed the appeals on 2nd May 1997. The Plaintiff 5 appealed to the Court of Appeal. Hence this grounds of Judgment.

The original Statement of Claim is 24 pages long and is therefore too long even to summarise. The proposed Amended Statement of Claim is 31 pages long.

Under the Original Statement of Claim, the Plaintiffs claimed against the First Defendant:

- (a) Under breach of duty of care/negligence;
- (b) under breach of fiduciary duty as constructive trustee;
- (c) under breach of Contract/and specially and in any event under its duty to indemnity by virtue of the provisions of the Sale and Purchase Agreement/Management Agreement.

Against the Second and Third Defendant:

- (a) under breach of duty of care/negligence;
- (b) under breach of fiduciary duty as constructive trustee

The Plaintiffs prayed for the following relief:

- (1) An injunction restraining the first defendant from any further dealings in the third Plaintiff's affairs, and in particular the management thereof, until the determination of this action or further.
- (2) An injunction restraining the First Defendant from any further dealings in the project or the land, until the determination of this action or further order.
- (3) An injunction restraining the Second and Third Defendants from exercising any powers

they may have under the loan agreements and Powers of Attorney granted thereunder, until the determination of this action or further order.

(4) An order for delivery up of all the Third Plaintiff Company's/Projects books, records and bank accounts, if any are in the possession of the First Defendant.

(5) An account of all dealings from the 7th February 1980 until this order.

(6) The appointment by the Court of an interim Manager (being Mr Ngo Tick Chong the project manager under the Original Plan Manager and/or any other person that the Court may deem fit and direct) to manage the affairs of the Company, including bank accounts and pay disbursements/collect rents and such other powers as may necessary to effectively and properly manage the Project, until trial or further order.

The restitution of the Plaintiffs to the original position, which envisages namely:-

(i) the transfer free of charge and free of encumbrances all shares held by the First Defendant in the Third Plaintiff to the First and Second Plaintiffs.

(ii) that all encumbrances whatsoever on the said lands (which includes the developed and undeveloped portion) be discharged by the Defendants.

(iii) that the First Defendant do compensate the First and Second Plaintiffs by repaying a sum of \$2.8 million together with interests thereon commencing from end of 1984 to date, at the rate of 12% p.a., being the sums required to be injected by the First and Second Plaintiffs into the Company in furtherance of the New Plan.

(iv) that the Third Plaintiff be relieved and discharged of its alleged liabilities to the Defendants amounting to approximately \$52 million.

(v) that the present "bare land" market value of the developed portion of the land which amounts to approximately \$4 million, together with profits which would have accrued on such portion of the land if the Original Plan had been followed which is estimated to be a sum of \$3 million together with interest at the rate of 12% p.a. on such profits from 1984 till to date, be paid by the First Defendant.

(8) Damages

(9) Exemplary damages should this Honourable Court find either gross negligence or fraud.

(10) Costs.

(11) Such further or other relief as this Honourable Court may deem fit."

In the proposed amendments, the Plaintiffs seek to add new paragraphs 16 and 17 as follows:

"16. The 2nd Defendant based on the existing charges in their favour, has since instituted foreclosure proceedings vide Penang High Court Originating Summons No. 24(31)-882-85 against the 3rd Plaintiff and obtained an Order for Sale of the said lands on 8.12.90. The 3rd Plaintiff's appeal vide Appeal No. 02-518-90 was dismissed by the Supreme Court. An

auction was held on 19.2.91 whereby the said lands were sold to the 2nd Defendant. The 3rd Plaintiff contends and will contend that the said lands had been charged to the 2nd Defendant improperly to secure loans taken by the 3rd Plaintiff at the request of the 1st Defendant who at all material times was in control of the affairs of the 3rd Plaintiff. In this respect, the 3rd Plaintiff repeats and adopts its averments as pleaded in paragraphs 12, 13, 14 and 15 above.

17. As a consequence of matters mentioned in paragraph 16 above, the 3rd Plaintiff states that the charges made in favour of the 2nd Defendants is null and void and that the 2nd Defendants was not entitled to exercise its' rights on the said charges. The 3rd Plaintiff states that the sale and subsequent transfer of the said lands to the 2nd Defendant is equally null and void and without legal effect.

The Plaintiffs also seek to add a new prayer 7:

"7. A declaration that the charges made in favour of the 2nd Defendant in relation to the said land is null and void and without legal effect."

The Plaintiffs also seek to amend the prayers by praying "that the said land be restituted in favour of the 3rd Plaintiff without such incumbrance".

It should be noted that in 1985 (four years before this suit was instituted in Kuala Lumpur High Court), the Second Defendant had instituted a foreclosure proceeding based on the same charges involving the same lands in Penang High Court vide Originating Summons No. 24(31)-882-85 against the (present) Third Plaintiff and obtained an Order for Sale on 8th December 1990. The (present) Third Plaintiff appealed against that order vide Supreme Court Civil Appeal No. 02-518-90. That appeal was dismissed by the Supreme Court. An auction was held on 19th February 1991 but there were no bidders. So the Second Defendant exercised its rights under that Order and bought the said lands for RM33 millions. Between November 1992 to April 1995 the Second Defendant successfully sold all the said land except two vacant lots to third parties and transferred them to the purchasers.

A number of grounds were forwarded during the argument.

Delay

I shall first deal with the question of delay in making this application.

We have seen that this action was instituted by the Plaintiffs in May 1990. About seven months later the Second Defendant obtained an order for sale of the said lands in another proceeding commenced four years earlier. The Second Defendant bought over the lands in 1991. From 1992 until 1995 almost all the lands were sold and transferred by the Second Defendant to third parties. Only in 1996 that the Plaintiffs made this application to amend the Statement of Claim, which is six years after the original Statement of Claim was filed.

Learned Counsel for the Plaintiffs argued that the Plaintiffs could not have asked for restitution at the time of filing the Statement of Claim because at that time the Plaintiffs were still the registered owners. That is true. But, as has been shown, the Second Defendant bought over the land in 1991. So, even taking that date, it is only five years later that this application was filed.

The proposed amendments also seek to challenge the validity of the charges and the sale and transfer of the said lands to the Second Defendant.

The charges were created from 1980 to 1984. They were the subject matter of the foreclosure proceeding which had gone right up to the Supreme Court and decided by that Court.

I accept that on the authority of the Supreme Court B decision in Kandiah Peter- v Public Bank Berhad (I), the Plaintiffs are not estopped from now challenging the validity of the charges on the ground that the issue had been decided in the foreclosure proceeding. But I am only stating this point here in considering the issue of delay in making this application.

It is to be noted that the Plaintiffs did not advance any explanation for the delay. Of course delay alone is not a sufficient ground to dismiss the application, but it is a factor to be considered by the Court in exercising its discretion whether or not to allow this application.

Time barred

Learned Counsel for the Defendants argued that the charges were created in 1980 to 1984. This application was filed in 1996, i.e. 16 years later. Therefore they submitted that this application was time barred.

On the other hand, learned Counsel for the Plaintiffs argued that time started to run from the date the Defendants "decided to enforce the charge". He further said "challenge to the charges occurred in 1990. Therefore in 1996 the action was not time-barred. Then he went on to argue that even if we were to take date of the first charge, which is 1980, at the time of issue, the Writ was not time-barred, because this is an action to recover land, therefore the limitation period is 12 years.

To this, learned Counsel for the First Defendant countered that the Plaintiff are now challenging the validity of the charges. Therefore limitation starts to run from the date of execution of the charges. He further said that the limitation period is six years because, as argued by learned Counsel for the Plaintiffs, this is an action in personam, and therefore not an action to recover land.

Learned Counsel for the Second and Third Defendant reiterated that as the Plaintiffs are challenging the validity of the charges, we must take the dates the charges were executed. Unfortunately none of them showed any authority to support his or her arguments regarding the effective date from which time starts to run. In the limited time I have to write this judgment I am unable to find any authority to assist me.

I must confess that I have some difficulty trying to decide this point though, logically, I think that since the Plaintiffs are challenging the validity of the charges, the date of execution of the charges should be the relevant date.

However, after serious thoughts, and in the circumstances of this case, I decided not to make a final finding on the issue at this stage.

In the circumstance I decided this case on the basis that the amendment is not time-barred (a fact which I must stress that I make no conclusive finding now), which is favourable to the

Plaintiffs.

As regards the principles, I am guided by the Judgment of the Federal Court in Yamaha Motor Co. Ltd. v Yamaha Malaysia Sdn. Bhd. and Ors. (2) which was also quoted with approval the Supreme Court judgment in Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn. Bhd.

(3) The principle was laid down by Mohamed Azmi S.C.J delivering the judgment of the Court as follows"

"Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see Kam Hoy Trading V Kam Fatt Tin Mine)(IJ). The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See Mallal's Supreme Court Practice page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim."

I shall deal first with the question whether the proposed amendment will turn the suit from one character into a suit of another character.

We see from the very lengthy Statement of Claim that the causes of action are breach of duty of care or negligence, breach of fiduciary duty as constructive trustee and breach of contract. The loans regarding which the lands were charged were only referred to in the "particulars" under the heading "All Three Defendants Breach of Duty of Care/Trust". Nowhere were the charges referred to. Nowhere was it said that the charges were null and void. I think I would not be wrong to say that the action as originally framed by the Plaintiffs assumed that the loans and the charges were properly made. We should also bear in mind that at the time the Statement of Claim was filed, the foreclosure proceeding based on the charges was already pending for about five years.

Now the proposed amendments say that the charges are null and void. This to my mind will add a new character to the suit which is clearly contradictory to the existing cause of action. The suit, based on the existing causes of action which was ordered by the Supreme Court to be heard together with two other suits is complicated enough. To add this new cause of action would only complicate the issues, the facts and indeed the trial. This last-mentioned reason alone, I think, is sufficient to dismiss the application.

One of the prayers that the Plaintiffs are seeking to add by way of the proposed amendment is for restitution of the lands to the Third Defendant.

The lands had been sold to the Second Defendants pursuant to Court order. That order was the subject matter of the appeal to the Supreme Court which appeal was dismissed and the

order confirmed. Subsequently, most of the lands were sold to third parties. For restitution to be made, the Order for Sale and the sales will have to be set aside. I do not think that this is something which this Court can now do. The position is clarified by the Court of Appeal in Low Lee Lian v Ban Hin Lee Bank Bhd (4) at page 92:

"When properly understood, there is therefore nothing in the decision in Kandiah that permits a chargor in a subsequent action to set aside an order for sale granted by the court inter parties. That may-not be done in the absence of an allegation of fraud in the procurement of the order. See Hock Hua Bank Bhd v Sahari bin Murid[1981] 1 MLJ 143. If a chargor is unhappy with an order for sale made inter parties, his only remedy is to appeal against it as has been done in the present case. All that Kandiah decides is that the making of an order for sale does not bar an action in personam between the same parties."

The remedy which the Plaintiffs have is an action in personam against the Defendants and for damages, not for restitution of the lands, especially, when most of them have been sold to Third Parties. So the proposed amendment seeking an order for restitution of the lands is clearly a useless amendment and should not be allowed - see Ponnusamyand Anor and Nathu Ram (5); Wong Ah Hee @ Wong Ah Mooi & Anor v Low Tuck Hoong (6); Esah Binti Sa'at v Meriam binSa'at & Ors. (7) 2.

The other ground put forward by learned Counsel for the Defendants in opposing the application is that the proposed amendment is prejudicial to the Defendants which cannot be compensated with costs. They rely on Yamaha Motors Co Ltd v Yamaha Malaysia Sdn Bhd & Ors (2) which have been quoted over and over again in subsequent cases. However, the argument of learned Counsel for the Defendants also overlap with the question of useless amendment on the ground that restitution cannot now be granted which I have touched on earlier. So, I do not think I need say anything more on it.

In conclusion under the circumstances and for the reasons which I have given, I do not think that the Court should exercise its discretion in favour of allowing the amendment. I therefore allowed the Defendants appeal.

Dated 19 June 1997

Sgd

(Dato' Abdul Hamid bin Haji Mohamad)

High Court Judge

Penang