Medallion Development Sdn Bhd v Bukit Kiara Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-2545-10 OF 2012
MOHD HISHAMUDIN, HAMID SULTAN AND UMI KALTHUM JJCA
16 JANUARY 2015

Contract — Agreement — Supplementary agreement — Sale and purchase agreement of parcel of land — Supplementary agreement based on balance purchase price — Contract rescinded — Whether time was of essence — Whether purchaser ought to pay balance of purchase price

The present appeal arose from the decision of the High Court which had found the appellant liable for breach of contract. The contract was a supplementary agreement ('the SA') entered into between the respondent as the vendor and the appellant as the purchaser pertaining to the sale and purchase of a parcel of land. The main agreement was a sale and purchase agreement ('SPA') between the respondent and the appellant of a parcel of land at the purchase price of RM29m. The subject land was transferred to the appellant after the appellant had paid the respondent a sum of RM25m. There was still a balance sum of RM4m to be paid to the respondent, which was the concern of the SA. The parties agreed in the SA that the balance purchase price of RM4m be paid in kind: in the form of the appellant transferring and delivering a certain number of condominium units in the project to the respondent worth RM4m within 36 months from the date of the SA (9 December 2004). Clause 1.1(b) of the SA provided that should the purchaser fail to meet the deadline of 36 months, the appellant was liable to pay interest to the vendor at the prescribed rate of 8% pa. Clause 13 of the SPA prescribed that time was of the essence of the agreement. There was no similar provision in the SA but cl 1.3 of the SA provided that the SPA and the SA were to be read as a single document. After 36 months, the appellant failed to transfer and deliver to the respondent the condominium units worth RM4m. The respondent rescinded the SA and demanded a payment of RM4m. The appellant on its part took the position that the respondent had no right under the SA to rescind the SA by reason of the delay, as the SA had, by its cl 1.1(b), specifically provided for a remedy of any delay in the transfer and delivery of the condominium units, in the form of the payment of interest. The High Court ordered the appellant to pay the respondent compensation in the sum of RM4m with interest as it was held that time was of the essence.

Held:

(1) Since the respondent was, by virtue of cl 1.1(b) of the SA, entitled to payment of interest for late delivery of the condominium units, the respondent was not entitled to rescind the SA purely because the appellant was not able to meet the deadline of 36 months. Where there was a delay, his remedy was in the entitlement to the payment of interest. The moment the deadline was breached, the respondent should invoke cl 1.1(b) and demand for the payment of interest at the prescribed rate; but the respondent in law was not entitled to rescind the contract — unless, of course, having demanded the payment of interest for the delay, the appellant refused to pay the same (see para 24).

(2) At the time of the rescission, there was no evidence that there was total failure of consideration or failure to perform the contract in its entirety. In fact, the appellant had obtained a development order, had launched the project, and had certificates of occupation issued in respect of the condominium units. A mere failure to meet the deadline of 36 months could not in law amount to total failure of consideration. A total failure of consideration could only arise as a matter of law where, for instance, the appellant, having failed to meet the deadline of 36 months, had refused, upon demand, to pay the prescribed interest for the delay in delivery to the respondent (see para 26).

(3) The court was reluctant to use the term 'equitable remedy'; but it was true that in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, the plaintiff cum purchaser, in rescinding the contract sought for the refund of all monies that he had paid to the developer for the purchase of the shop lot as well as damages; whereas in the present case, the respondent, in rescinding the SA, for obvious reason, was not seeking that the land sold to the appellant be restored to the respondent; it was only seeking compensation for financial loss. But this difference in facts was not material and could not be a valid reason for not following the principle in *Berjaya Times Square*. On the facts of the present case, the principle in *Berjaya Times Square* was binding on the High Court (see para 28).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada keputusan Mahkamah Tinggi yang mana mendapati perayu bertanggungjawab untuk kemungkiran kontrak. Kontrak adalah perjanjian tambahan ('PT') yang dimasuki di antara responden sebagai penjual dan perayu, sebagai pembeli berkaitan kepada jual beli sebidang tanah. Perjanjian utama adalah perjanjian jual beli ('PJB') di antara responden dan perayu terhadap sebidang tanah harga beliannya sejumlah RM29 juta. Tanah tersebut dipindahkan kepada perayu selepas perayu telah membayar responden sejumlah RM25 juta. Masih terdapat jumlah baki sebanyak RM4 juta untuk

dibayar kepada responden, yang mana adalah berkaitan PT tersebut. Pihak-pihak bersetuju di dalam PT bahawa baki harga belian sebanyak RM4 juta dibayar dalam bentuk barangan: dalam bentuk perayu memindahkan dan memberikan beberapa jumlah tertentu unit pangsapuri dalam projek kepada responden yang bernilai RM4 juta dalam masa 36 bulan dari tarikh PT (9 December 2004). Klausa 1.1(b) PT memperuntukkan bahawa sekiranya pembeli gagal untuk memenuhi tempoh akhir 36 bulan, perayu bertanggungjawab untuk membayar faedah kepada penjual pada kadar yang ditetapkan sejumlah 8 peratus setahun. Klausa 13 PJB menetapkan bahawa masa adalah inti pati perjanjian tersebut. Tidak terdapat peruntukan yang sama di dalam PT; tetapi klausa 1.3 PT memperuntukkan bahawa PJB dan PT hendaklah dibaca sebagai satu dokumen. Selepas 36 bulan, perayu gagal untuk memindahkan dan memberikan kepada responden unit-unit pangsapuri bernilai RM4 juta. Responden membatalkan PT tersebut dan menuntut bayaran sebanyak RM4 juta. Perayu berhujah bahawa responden tidak mempunyai hak di bawah PT untuk membatalkan PT atas alasan kelewatan, kerana PT telah, melalui klausa 1.1(b)nya, secara khusus meperuntukkan bagi remedi untuk apa-apa kelewatan dalam pemindahan dan pemberian unit-unit pangsapuri, dalam bentuk bayaran faedah. Mahkamah Tinggi memerintah perayu untuk membayar kepada responden pampasan sejumlah RM4 juta dengan faedah kerana ia diputuskan bahawa masa adalah intipati.

Diputuskan:

(1) Memandangkan responden adalah mengikut klausa 1.1(b) PT, berhak kepada bayaran faedah untuk pemberian lewat unit-unit pangsapuri, responden tidak berhak untuk membatalkan PT semata-mata kerana perayu tidak dapat memenuhi tempoh akhir sebanyak 36 bulan. Di mana terdapat kelewatan, remedinya adalah dalam hak kepada bayaran faedah tersebut. Sebaik saja tempoh akhir dilanggar, responden patut membangkitkan klausa 1.1(b) dan menuntut untuk bayaran faedah pada kadar yang ditetapkan; tetapi responden dari segi undang-undang, tidak berhak untuk membatalkan kontrak tersebut — kecuali, sekiranya, setelah menuntut bayaran faedah untuk kelewatan, perayu enggan untuk membayarnya (lihat perenggan 24).

(2) Pada masa pembatalan tersebut, tidak terdapat keterangan bahawa terdapat kegagalan sepenuhnya terhadap balasan atau kegagalan untuk melaksanakan kontrak secara keseluruhannya. Sebenarnya, perayu telah memperolehi perintah kemajuan, telah melancarkan projek tersebut, dan mempunyai sijil penghunian dikeluarkan berkaitan unit-unit pangsapuri tersebut. Kegagalan semata-mata untuk memenuhi tempoh akhir selama 36 bulan tidak dapat dari segi undang-undang merupakan kegagalan sepenuhnya terhadap balasan. Kegalan sepenunya terhadap balasan hanya boleh berbangkit sebagai perkara undang-undang di mana, contohnya, perayu, setelah gagal untuk memenuhi tempoh akhir selama

36 bulan, telah enggan, atas tuntutan, untuk membayar faedah yang ditetapkan untuk kelewatan dalam pemberian kepada responden (lihat perenggan 26).

(3) Mahkamah agak keberatan untuk menggunakan terma 'equitable remedy'; tetapi ia adalah betul bahawa dalam kes *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, plaintif merangkap pembeli, dalam membatalkan kontrak memohon untuk bayaran balik kesemua wang yang dia bayar kepada pemaju untuk pembelian lot kedai dan juga ganti rugi; sebaliknya dalam kes ini, responden, dalam membatalkan PT tersebut, untuk alasan yang jelas, tidak memohon bahawa tanah yang dijual kepada perayu dikembalikan kepada responden: ia hanya memohon pampasan untuk kerugian kewangan. Tetapi perbezaan ini sebenarnya bukan material dan tidak boleh menjadi alasan sah untuk tidak mengikuti prinsip dalam kes *Berjaya Times Square*. Atas fakta kes ini, prinsip dalam kes *Berjaya Times Square* adalah mengikat ke atas Mahkamah Tinggi (lihat perenggan 28).]]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2944–3004.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (folld)

Gan Hwa Kian & Anor v Shencourt Sdn Bhd [2007] 4 MLJ 554, HC (refd)

Legislation referred to

Contracts Act 1950 s 76

Appeal from: Civil Suit No S6-22–267 of 2008 (High Court, Kuala Lumpur)

Justin Voon and Kho Zhen Qi (Justin Voon Chooi & Wing) for the appellant.

Sean Yeow Huang Meng (Himahlini Ramalingam with him) (Lee Hishammuddin Allen & Gledhill) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] The appellant, Medallion Development Sdn Bhd ('first defendant at the High Court'), appealed before us against the decision of the learned judge of the High Court who had found the appellant liable for breach of contract, the contract being a supplementary agreement dated 9 December 2004 ('the SA') entered into between the respondent, Bukit Kiara Development Sdn Bhd ('the plaintiff at the High Court'), and the appellant pertaining to the sale and

purchase of a parcel of land between the respondent (the vendor) and the appellant (the purchaser). A

[2] On 26 June 2014, we unanimously allowed the appeal with costs.

[3] We now give our grounds. B

[4] The SA is supplementary to the main agreement dated 12 November 2004. The main agreement is a sale and purchase agreement ('the SPA') between the respondent/vendor and the appellant/purchaser of a parcel of land belonging to the respondent. The land in question is situated in Kuala Lumpur; and the purchase price is RM29m. The appellant intended to turn the land into a housing project to build condominiums on it and to sell them for profit. C

[5] The subject land pursuant to the SPA was transferred to the appellant on 23 March 2005 after the appellant had paid the respondent a sum of RM25m. D

[6] There is still a balance sum of RM4m to be paid to the respondent.

[7] The appellant obtained a development order from the local authority on 14 March 2006. E

[8] The project to build the condominiums was launched in May 2007.

[9] The certificates for occupation for all the condominium units in the project were issued on 3 August 2011. F

[10] The SA concerns only the repayment of the balance purchase price in the sum of RM4m, as RM25m had been fully paid in cash. The parties agreed in the SA that this balance purchase price of RM4m be paid in kind in the form of the appellant transferring and delivering a certain number of condominium units in the project to the respondent worth RM4m within 36 months from the date of the SA (9 December 2004). G

H

[11] Clause 1.1(b) of the SA provides:

> (b) Payment in kind
>
> The balance Purchase Price amounting to a sum of Ringgit Malaysia Four Million (RM4,000,000.00) only (hereinafter referred to as 'the Balance Sum') shall be settled or satisfied by the Purchaser to the Vendor by way of setting off against the number of units of the Project equivalent to the value of Ringgit Malaysia Four Million (RM4,000,000.00) only (hereinafter referred to as 'the Settlement Properties')(after a discount of ten per centum (10%) of the sale price of the Settlement Properties) within thirty six (36) months from the date of this I

A Supplemental Agreement, failing which, the Purchaser shall be liable to pay to the Vendor late interest on the sum of Ringgit Malaysia Four Million (RM4,000,000.00) only at the rate of eight per centum (8%) per annum calculated on daily basis from the expiry of the thirty six (36) months from the date of this Supplementary Agreement to the date of delivery of the vacant possession of the
B Settlement Properties to the Vendor.

[12] It is important to note that the above clause provides that should the purchaser (the appellant) fail to meet the dateline of 36 months (for the delivery of the condominium units to the vendor (the respondent)) the
C appellant is liable to pay interest to the vendor (the respondent) at the prescribed rate of 8% pa.

[13] It is provided in cl 13 of the SPA that time is of the essence of the
D agreement. There is no similar provision in the SA; but clause 1.3 of the SA provides that the SPA and the SA are to be read as a single document.

[14] It is provided in cl 2 of the SA that in the event of a conflict in relation to the terms and conditions in the SPA and the SA the terms and conditions of
E the SA shall prevail.

[15] It is common ground that the 36 month dateline ends on 9 December 2007.

F **[16]** After 36 months, the appellant failed to transfer and deliver to the respondent the condominium units worth RM4m.

[17] By reason of this failure on the part of the appellant, the respondent by
G its solicitors' letter of 17 January 2008, rescinded the SA, and demanded a payment of RM4m from the appellant as compensation, claiming that this is the sum of the loss that it suffered by reason of the failure on the part of the appellant to transfer and deliver the condominium units within the stipulated period of 36 months.

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[18] It is undisputed that the respondent terminated the SA on 17 January 2008.

[19] Apart from this slightly just over a month delay on the part of the
I appellant, before the respondent issued its letter of rescission of 17 January 2008, there is no allegation or evidence of refusal on the part of the appellant to transfer the condominium units as agreed. Also there is no allegation or evidence that the condominium units will never be completed at all by the appellant; or that the appellant had abandoned the development project.

[20] In the respondent's writ action against the appellant, filed on 5 March 2008, the respondent claims payment of RM4m from the appellant with interest as the loss that the respondent allegedly suffered by the alleged breach of the SA on the part of the appellant.

[21] Before the High Court the respondent acknowledged in its submission in reply that (see p 573, Appeal Record vol 2(3), part C):

> 2.2 The fact that this is [the] agreed time limit for the payment in kind to be made is reinforced by the fact that Clause 1.1 (b) goes on to provide for late interest from the expiry of 36 months from the date of the Supplementary Agreement until the date of delivery of the properties.

[22] The appellant on its part takes the position that the respondent had no right under the SA to rescind the SA by reason of the delay, as the SA has, by its cl 1.1(b), specifically provided for a remedy for any delay in the transfer and delivery of the condominium units, in the form of the payment of interest.

[23] The learned High Court judge accepted the respondent's arguments and ordered the appellant to pay the respondent compensation in the sum of RM4m, with interest. The learned High Court judge ruled that time is of the essence and relied on the following passage of the judgment of Abdul Malik Ishak J (as he then was) in the High Court case of *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554 where at p 561 para 9 the learned judge said:

> Here, the plaintiffs decided to rescind the contract. Section 76 of the Contracts Act 1950 (Act 136) provides that a party who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. It was part and parcel of my judgment that the plaintiffs' entitlement to liquidated damages if the defendant failed to complete the property within 36 months did not in any way take away the rights of the plaintiffs to rescind the contract.

[24] In the present case, it is our judgment that since the respondent is, by virtue of cl 1.1(b) of the SA, entitled to payment of interest for late delivery of the condominium units, the respondent is not entitled to rescind the SA purely because the appellant was not able to meet the dateline of 36 months. Where there is a delay, his remedy is in the entitlement to the payment of interest. The moment the dateline was breached, the respondent should invoke cl 1.1(b) and demand for the payment of interest at the prescribed rate; but the respondent, in law, is not entitled to rescind the contract — unless, of course, having demanded the payment of interest for the delay, the appellant refused to pay the same.

[25] It has been held by the Federal Court in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 that where there has been a breach of the dateline for delivery of the property, there is no right to rescind the contract unless there is a total failure of consideration or failure to perform the contract in its entirety. We quote here the relevant portion of the judgment:

> [44] Returning to the mainstream, we have here an agreement which contains two clauses. One that provides for the payment of a sum as liquidated damages calculated on a daily basis for the period of delay in making delivery of the premises in question and another that makes time of the essence of the contract. Applying the guidelines discussed earlier, it is my judgment that time is not of the essence of the agreement in this case. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.

[26] In the present case, at the time of the rescission, there is no evidence that there was total failure of consideration or failure to perform the contract in its entirety. In fact the appellant had obtained a development order, had launched the project, and had certificates of occupation issued in respect of the condominium units. A mere failure to meet the dateline of 36 months cannot in law amount to total failure of consideration. A total failure of consideration can only arise as a matter of law where, for instance, the appellant, having failed to meet the dateline of 36 months, had refused, upon demand, to pay the prescribed interest for the delay in delivery to the respondent.

[27] The learned High Court judge in refusing to follow *Berjaya Times Square* was of the view that that case could be distinguished in that in *Berjaya Times Square* the plaintiff was seeking an 'equitable remedy' whereas in our case the respondent is only seeking damages. In the words of the learned Judge:

> Diteliti pada perjanjian jual beli dan perjanjian tambahan, plaintif cuma melaksanakan hak beliau untuk menamatkan kontrak dan menuntut untuk gantirugi.
>
> Kes *Berjaya Times Square* adalah berkaitan dengan penamatan untuk remedi ekuiti di mana plaintif ingin meletak keadaan dirinya dalam keadaan asal sebelum penamatan kontrak.

[28] With respect we are unable to follow this reasoning. We are reluctant to use the term 'equitable remedy'; but it is true that in *Berjaya Times Square* the plaintiff cum purchaser, in rescinding the contract (the sale and purchase agreement), sought for the refund of all monies that he had paid to the developer for the purchase of the shop lot as well as damages; whereas in our case the respondent, in rescinding the SA, for obvious reason, is not seeking that the land sold to the appellant be restored to the respondent: it is only

seeking compensation for financial loss. But this difference in facts is not material and cannot be a valid reason for not following the principle in *Berjaya Times Square*. On the facts of the present case, the principle in *Berjaya Times Square* is binding on the High Court judge.

[29] Appeal allowed with costs. Order of the High Court set aside.

Order accordingly.

Reported by Afiq Mohamad Noor