

**Pinnacle Homes SP Sdn Bhd**  
**(dahulunya dikenali sebagai I-Con Empire Sdn Bhd)**

**v**

**Yayasan Wilayah Persekutuan**

**High Court**, Kuala Lumpur – Suit No. WA-12ANCvC-227-09/2019

10 Mohd Firuz Jaffril J

August 3, 2020

15 *Civil procedure – Summary judgment – Appeal against – Claim for balance due under sale and purchase agreement – Counterclaim by appellant for unjust enrichment and monies had and received by respondent – Whether monies advanced by appellant not made gratuitously for benefit of respondent – Affidavit in support of summary judgment void of oath and/or affirmation at jurat – Whether affidavit defective for non-compliance with Order 41 r 1(8) of the Rules of Court 2012 and ought to have been expunged – Whether triable issues raised by respondent – Contracts Act 1950, s 71 – Rules of Court 2012, Order 14, Order 41 r 1(8)*

25 The appellant ("the defendant") had on December 30, 2014 entered into a sale and purchase agreement and supplemental agreement ("the agreements") with the respondent ("the plaintiff") for the purchase of a piece of land. The  
30 defendant had paid almost the entire purchase price except for the final payment amounting to RM822,905.37 ("the final payment"), resulting in the plaintiff filing the instant suit against the defendant to claim for the same. The defendant thereafter applied for summary judgment for the sum of  
35 RM1,680,893.14 pursuant to Order 14 of the Rules of Court 2012 ("the ROC") ("the application") premised on its counterclaim for monies advanced by it to the plaintiff ("the advance payments") to assist the plaintiff in making  
40 payments it was contractually obligated to make under the agreements i.e. payments for relocation costs of the morning hawkers, stamp duty, real property gains tax and legal fees for the plaintiff's solicitors ("the plaintiff's contractual obligations").

Aggrieved by the Sessions Court's decision to dismiss its application, the defendant filed the instant appeal on the grounds inter alia that the Sessions Court had erred in failing to expunge the plaintiff's affidavit which was void of any oath and/or affirmation in accordance with Order 41 r 1(8) of the ROC ("the defective affidavit"); the Sessions Court had wrongly construed the terms of the agreements especially the provisions on the plaintiff's contractual obligations; that the advance payments ought to be returned to

the defendant in absence of evidence showing the defendant had agreed to give the same for free; and that by receiving the benefit and/or monies advanced by the defendant on the plaintiff's behalf, the plaintiff had been unjustly enriched.

The plaintiff on the other hand contended inter alia that the defective affidavit issue is a mere technical non-compliance of the ROC and should not override the interest of justice; that there is no substantial miscarriage of justice or prejudice to the defendant caused by the defective affidavit; that the defective affidavit may be used with the leave of court; that the issue of whether the advance payments were made voluntarily is a triable issue; that the evidence of such payments by way of receipts and invoices exhibited by the defendant needs to be further explained by witnesses; and that the plaintiff was not unjustly enriched as the advance payments were given on the defendant's own volition despite no request being made by the plaintiff.

**Issue(s)**

1. Whether the Sessions Court had erred in failing to expunge the defective affidavit.
2. Whether there are any triable issues.

**Held**, allowing the appeal with costs of RM5,000 subject to allocatur

1. The Sessions Court had erred by side-stepping the issue of the defective affidavits raised by the defendant at the summary judgment stage given that Order 41 r 1(8) of the ROC mandates that a jurat be inserted in an affidavit used in court proceedings and that it is therefore incumbent on a party to comply strictly with the said mandatory provision. The failure to do so cannot be remedied by viewing the breach as a mere technical requirement that does not prejudice the opposing party. Had the Sessions Court been vigilant, the plaintiff could have filed a corrective affidavit or an application to use a defective affidavit. [see p 526 paras 11(i)-11(iii)]
2. (a) The Sessions Court had erred in finding that there is an issue to be tried where witnesses are to be called with regards to the non-payment of RM822,905.37 as a setting off from the prerequisite condition considering the cost incurred by the defendant for the total sum of RM1,680,893.14. The Sessions Court failed to distinguish between claim and counterclaim which are two separate issues that are to be dealt with at two different stages. The plaintiff's contention that the defendant had failed to prove their counterclaim and hence the application should be dismissed falls

1 short of the actual legal position bearing in mind that in an Order 14  
application, the burden of proof is on the defendant to raise triable  
issues and not for the plaintiff to prove its claim. [see p 526 para 11(iv)  
- p 527 para 11(v)]

5 (b) The terms of the agreements clearly show that the particular  
payments made by the defendant toward the plaintiff's contractual  
obligations are to be borne by the plaintiff. There is no ambiguity in  
10 construing the provisions of the agreements. In this regard, the  
agreements are contemporaneous documents that are not disputed  
by both parties and must be given effect by the court. [see p 524  
para 9 - p 527 para 11(vi)]

15 (c) On the facts, it is clear that the plaintiff never pleaded that the  
advance payments made by the defendant were on a gratuitous  
basis. This contention was only raised in the plaintiff's affidavit and  
20 it is trite law that an affidavit cannot be used to enhance or improve  
the parties' pleadings. Insofar as the amount paid by the defendant  
on behalf of the plaintiff is concerned, it was never disputed by the  
plaintiff in any of their affidavits. In any event, a bare denial or  
25 assertion made by a defendant in a summary judgment application  
does not constitute evidence nor does it give rise to triable issues.  
[see p 527 para 11(vii) – p 528 para 11(viii)]

30 (d) Four prerequisites must be proved in a claim under s 71 of the  
Contracts Act 1950 ("the CA 1950"), namely, that the act that was  
carried out must be lawful; that the act was carried out for another  
person; that the act that was carried out must not be intended to be  
35 done gratuitously; and that the act that was carried out must be  
such that the other person enjoyed the benefit of the act or the  
delivery. On the facts, the instant case is a clear case under s 71 of the  
CA 1950 and of monies had and received and there is nothing to  
show that the advance payments were made by the defendant  
40 gratuitously. In the premises and by not reimbursing the  
defendants, the plaintiff would undoubtedly be unjustly enriched.  
[see p 528 paras 11(ix)-11(xi)]

### Case(s) referred to by the court

*Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 1 AMCR  
877; [2012] 4 MLJ 59, CA (ref)

*Alexander Lesley Peters (berniaga di bawah nama dan gaya Flatfish Studio) v  
Raymund Gagarin a/l S Joseph & Anor* [2009] AMEJ 0227; [2009] MLJU 1304,  
HC (ref)

<i>Bank Negara Malaysia v Mohd Ismail &amp; Ors</i> [1992] 1 MLJ 400, SC (ref)	1
<i>Chen Heng Ping @ Tian Seow Hock &amp; 5 Ors v Intradagang Merchant Bankers (M) Bhd</i> [1995] 2 AMR 1655; [1995] 2 MLJ 363, CA (ref)	
<i>Choo Ngie Sin v Tan Kok Ming</i> [1996] MLJU 381 (ref)	
<i>Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah b Mohd Noor (and Another Appeal)</i> [2009] 5 AMR 298; [2009] 4 MLJ 149, FC (ref)	5
<i>Gold Ores Reduction Co Ltd v Parr</i> [1892] 2 QB 14, QBD (UK) (ref)	
<i>Kosbina Konsult (K) Sdn Bhd (in liquidation) v Madu Jaya Development Sdn Bhd</i> [2019] 2 AMR 885; [2019] MLJU 214, CA (ref)	10
<i>Low Cheng Soon v TA Securities Sdn Bhd</i> [2003] 2 AMR 287; [2003] 1 CLJ 309, CA (ref)	
<i>Melewar Equities Sdn Bhd v Ezuirin Yusnita bt Abdul Malik</i> [2018] MLJU 567 (ref)	15
<i>National Company For Foreign Trade v Kayu Raya Sdn Bhd</i> [1984] 2 MLJ 300, FC (ref)	
<i>Tindok Besar Estate Sdn Bhd v Tinjar Co</i> [1979] 2 MLJ 229, FC (ref)	20
<i>United Malayan Banking Corporation Bhd v Palm &amp; Vegetable Oils (M) Sdn Bhd &amp; Ors</i> [1983] 1 MLJ 206, FC (ref)	

## Legislation referred to by the court

### Malaysia

Contracts Act 1950, s 71

Rules of Court 2012, Order 14, Order 41 r 1(8)

### Solicitors

*Justin Voon Tiam Yu* (Justin Voon Chooi & Wing) for appellant  
*Shukor & Assoc* for respondent

*Judgment received: October 8, 2020*

## Mohd Firuz Jaffril J

### Introduction

[1] This present appeal before me arose from the decision given by the Sessions Court judge dated September 10, 2019.

[2] The appellant herein was the defendant in the Sessions Court, whereas the respondent was the plaintiff. Pursuant to the filing of their counterclaim for the sum of RM1,680,893.14, the defendant took out an application for summary judgment against the plaintiff pursuant to Order 14 of the Rules of Court 2012.

**1 The plaintiff's pleaded case**

[3] The factual matrix of the present appeal are as follows:

- 5 (i) On December 30, 2014, the defendant entered into a sale and purchase agreement ("SPA") to purchase a piece of land from the plaintiff for the purchase price of RM35,484,011.00;
- 10 (ii) Simultaneous with the execution of the SPA, both parties also executed a supplemental SPA;
- 15 (iii) At the material time, the plaintiff was the beneficial owner of the said land by virtue of a sale and purchase agreement dated October 13, 2014 under which the plaintiff purchased the said land from Datuk Bandar Kuala Lumpur ("the DBKL SPA");
- 20 (iv) It is the plaintiff's case that the defendant had paid almost the entire purchase price with the exception of the final payment amounting to RM822,905.37. Despite issuing a cheque for the said final payment in the plaintiff's name, the defendant through their bank, stopped the payment of the said cheque;
- 25 (v) Due to the defendant's refusal to pay the balance purchase price (by raising a number of issues which the plaintiff says are afterthoughts), the plaintiff initiated this suit.

**The defendant's pleaded case**

30 [4] The defendant does not dispute the existence of the SPA, supplemental SPA and the DBKL SPA.

35 [5] As a matter of fact, the defendant's counterclaim is based on the terms of the SPA wherein the plaintiff was contractually obligated to pay for the following costs and expenses:

- a. Relocation costs of the morning hawkers:
  - 40 See – Section 3.02(ii) of the SPA and section 1(iii) of the supplemental SPA
- b. Stamp duty:
  - See – Clause 16 of the DBKL SPA
- c. Real property gains tax ("RPGT"):
  - See – Section 10.20 of the SPA
- d. Legal fees of the plaintiff's solicitors:
  - See – Section 10.07 of the SPA

[6] In all, the defendant had provided financial assistance in the sum of RM1,680,893.14 towards payment of the above costs which the plaintiff was contractually obligated to pay. The breakdown of the financial assistance can be seen below:

- a. Relocation costs: *RM307,748.49*
- b. Stamp duty: *RM908,535.00*
- c. RPGT: *RM327,439.50*
- d. Legal fees of the plaintiff's solicitors: *RM140,170.20*

[7] According to the defendant, these payments were not made gratuitously for the benefit of the plaintiff.

[8] Hence, when the plaintiff started claiming for the balance of the purchase price of *RM822,905.37*, the defendant in turn counterclaimed for the sum of *RM1,680,893.13* based on a cause of action of unjust enrichment against the plaintiff and for monies had and received.

**The defendant's submission in support of their appeal against the decision of the Sessions Court**

[9] In summary the defendant contended as follows:

- (i) the Sessions Court judge erred in her decision when she failed to expunge the affidavit deposed by Zaizalnizam Zainun on July 19, 2019 despite the said affidavit being defective for being void of any oath and/or affirmation at the jurat (see Order 41 r 1(8) of the Rules of Court 2012);
- (ii) the Sessions Court judge erred in failing to construe the terms of the contract executed by the parties herein in particular the provisions which imposed contractual obligations on the plaintiff to make payment towards the relocation costs, stamp duty, RPGT and the plaintiff's solicitors legal fees. Payments made by the defendant were advances which were monies had and received by the plaintiff and/or the costs incurred by the defendant to the benefit of the plaintiff. In this regard, the plaintiff was unjustly enriched from the monies advanced by the defendant;
- (iii) as there is not a single shred of evidence showing that the defendant had agreed to advance the sum of *RM1,680,893.19* for free for purposes of meeting the plaintiff's contractual obligations, the said sum ought to be returned by the plaintiff to the defendant;

- 1 (iv) in receiving the benefit and/or monies advanced by the defendant on  
the plaintiff's behalf, the plaintiff had been unjustly enriched.

**The plaintiff's submission**

5 [10] In opposing the defendant's appeal against the decision of the learned  
Sessions Court judge, the plaintiff in essence submitted as follows:

- 10 (i) the issue of the Zaizalnizam Zainun's affidavit being defective is a  
mere technical non-compliance of the rules and should not override  
the interest of justice;
- 15 (ii) there is no substantial miscarriage of justice caused by the jurat being  
defective;
- 20 (iii) a defective affidavit may with the leave of the court, be filed or used  
in evidence notwithstanding any irregularity. The fact that the  
learned Sessions Court judge had accepted the affidavit as part of her  
grounds shows that she had allowed the use the defective affidavit.  
This decision should not be interfered with;
- 25 (iv) there is no prejudice suffered by the defendant as a result of the  
alleged defective affidavit;
- 30 (v) insofar as the contractual terms governing the sale and purchase of  
the land are concerned, the plaintiff admits that they bear the  
responsibility of paying for the relocation costs, stamp duty, RPGT  
and the plaintiff's solicitor's legal fees. However, the appellant had on  
their own volition made payment towards the items listed as part of  
35 the contractual obligations without any request from the plaintiff;
- 40 (vi) the Sessions Court judge was correct in her finding that the issue of  
whether the payment of the RM1,680,893.14 by the defendant was  
made voluntarily or otherwise is a triable issue that ought to be  
decided by viva voce evidence;
- (vii) furthermore, the evidence of such payments by way of receipts and  
invoices exhibited by the defendant needs to be further explained by  
witnesses (see *Choo Ngie Sin v Tan Kok Ming* [1996] MLJU 381);
- (viii) there is also no evidence in the defendant's affidavit to show that the  
plaintiff had requested for aid in order to meet their contractual  
obligations (see *Melewar Equities Sdn Bhd v Ezuirin Yusnita binti Abdul  
Malik* [2018] MLJU 567);

- (ix) there is no unjust enrichment as the plaintiff did not request the defendant to advance such monies or payment on the plaintiff's behalf (reliance placed on the following cases: *Alexander Lesley Peters (berniaga di bawah nama dan gaya Flatfish Studio) v Raymund Gagarin a/l S Joseph & Anor* [2009] AMEJ 0227; [2009] MLJU 1304 and *Kosbina Konsult (K) Sdn Bhd (in liquidation) v Madu Jaya Development Sdn Bhd* [2019] 2 AMR 885; [2019] MLJU 214).

### Court's analysis and finding

[11] This court finds merit in the present appeal based upon having analysed and reviewed the pleadings vis-à-vis the record of appeal and the submissions of the parties:

- (i) the Sessions Court judge did err by side-stepping the issue of the defective affidavits raised by the appellant and the summary judgment stage.
- (ii) a perusal of the Zaizalnizam's affidavit shows that the affidavit clearly fails to comply with Order 41 r 1(8) of the RC 2012 which mandates for a jurat to be inserted in an affidavit used in court proceedings. I take the view that it is incumbent for a party to comply strictly with mandatory provision as a failure to do so cannot be remedied by viewing the breach as a mere technical requirement that does not prejudice the opposing party (see the Federal Court's decision in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor (and Another Appeal)* [2009] 5 AMR 298; [2009] 4 MLJ 149, FC and the Court of Appeal decision in *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 2 AMR 287 [2003] 1 CLJ 309).
- (iii) had the Sessions Court judge been vigilant, the plaintiff at the court below could have filed a corrective affidavit or filed an application to use a defective affidavit.
- (iv) the Sessions Court judge erred at paragraph [50] of her grounds of judgment in finding that there is an issue to be tried where witnesses are to be called with regards to the non-payment of RM822,905.37 as a setting off from the prerequisite condition as the costs were incurred by the defendant for the total of RM1,680,893.14. The Sessions Court failed to distinguish between claim and counterclaim which are two separate issues that are to be dealt with at two different stages.



(v) the plaintiff's stand that the defendant has failed to prove their counterclaim and hence the Order 14 application should be dismissed, falls short of the actual legal position. To the contrary, in an Order 14 application, the burden of proof is on the defendant to raise triable issues and not for the plaintiff to prove their claim (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 and *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300).

(vi) the terms of the agreement between both parties are clear and section 10.07 of the SPA wherein the costs towards relocation of the hawkers, stamp duty, RPGT, and the plaintiff's legal costs (in total RM1,680,893.19) paid for by the defendant were to be borne by the plaintiff. In this regard, I find no ambiguity in construing the provisions of section 3.02(ii) and section 1(iii) of the SPA and the supplemental SPA respectively, clause 16.1 of the DBKL SPA, section 10.20 of the SPA. This to my mind is a contemporaneous document that is not disputed by both parties that must be given effect by this court (see *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229).

(vii) looking at the pleaded case of the plaintiff, it is clear that the plaintiff never pleaded that the payments made by the defendant were on a gratuitous basis. This contention was only raised in the plaintiff's affidavit. It is trite law that an affidavit cannot be used to enhance or improve a parties pleadings.

In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, Seah FJ in referring to the case of *Gold Ores Reduction Co v Pain* [1892] 2 QB 14 where it was held that for the purpose of Order 14 application the statement of claim must be complete and good in itself; ***any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit.*** Furthermore, if the defect is one of substance, the application for summary judgment.

In *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, Raja Azlan Shah in delivering his judgment held as follows:

As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September, 1980, and these matters were only disclosed for the first time in June, 1981 in the affidavit in support of the Order 14 summons. *This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: Gold Ores Reduction Co v Parr* [1892] 2 QB 14 where Mathew J, said that "it is most important that a defendant should know

from the writ what the exact claim against him is". The respondents also complain of the timing of the sale and the price realised and we would on this aspect refer to *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] Ch 949 [which was applied in *Duke v Robson* All ER 481 at 488] that the duty of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in *Standard Chartered Bank v Walker & Anor* dated June 21, 1982. We would add that even after the sale of the shares there was and has been no attempt to amend the statement of claim to reflect the true position.

(viii) insofar as the amount paid by the defendant on behalf of the plaintiff, these amounts were never disputed by the plaintiff in any of their affidavits. Furthermore bare denial or assertions made by a defendant in a summary judgment application do not constitute evidence and do not give rise to triable issues (see the decision of Mahadev Shankar JCA in *Chen Heng Ping @ Tian Seow Hock & 5 Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 AMR 1655; [1995] 2 MLJ 363).

(ix) in a claim under s 71 of the Contracts Act 1950, the plaintiff must prove the following four prerequisites:

- (a) the act carried out must be lawful;
- (b) the act was carried out for another person;
- (c) the act carried out must not be intended to be done gratuitously; and
- (d) the act carried out by the plaintiff must be such that the other person enjoyed the benefit of the act or the delivery.

See: the Court of Appeal decision in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 1 AMCR 877; [2012] 4 MLJ 59.

(x) based on the affidavit evidence before me, it does not show that the payments were made by the defendant gratuitously. Having found so, I am of the view that this is a clear case under s 71 of the Contracts Act and monies had and received.

(xi) without reimbursing the defendants, the plaintiff would undoubtedly be unjustly enriched.

[12] In the upshot, the appeal is hereby allowed. Having heard brief submissions on the issue of costs by counsels from both parties, I am of the view that an award of RM5,000.00 as costs subject to allocatur is reasonable. I order so accordingly.