Mah Sing Properties Sdn Bhd
v
Tan Mee Su & Anor

High Court, Johor Bahru – Appeal No. JA-12BNCvC-29-10/2022
Shamsulbahri Ibrahim J

August 16, 2023

Contract *– Breach – Sale and purchase agreement – Claim for liquidated ascertained damages ("LAD") for failure to deliver vacant possession within stipulated time – Whether extension of time granted to developer contractually valid – Whether vacant possession of property delivered within valid timeframe – Whether purchaser entitled to LAD – Whether delay attributable to developer*

Vide two sale and purchase agreements ("the SPAs"), the respondents/plaintiffs purchased two units of detached factories ("the factories") from the appellant/defendant, located within a project known as "i-Parc@Tanjung Pelepas" ("the project"). The defendant had to deliver the vacant possession of the factories to the plaintiffs within 36 months from the date of the SPAs, failing which the defendant shall pay the liquidated ascertained damages ("LAD") to the plaintiffs. The defendant failed to do so which prompted the plaintiffs to claim for the LAD from the defendant. Bearing in mind that the engineer of the project had granted the defendant three extensions of time ("EOT") pursuant to the SPAs until the end of January 2017, the latter averred that since the vacant possession of the factories was delivered in October 2016 which was within the new extended timeframe, the plaintiffs were not entitled to the LAD. The plaintiffs then filed a suit against the defendant for the LAD at the Sessions Court wherein the judge ("the SCJ") concluded that all extension of time certificates ("EOTCs") issued by Jurutera Perunding Cekap ("JPC") to the defendant were not valid, wrong and defective as they were issued by an engineer who was not qualified to issue them under the SPAs; and only an architect was the qualified person to grant the EOTCs. Hence, the present appeal.

Issue(s)

1. Whether the EOTCs were contractually valid.
2. Whether the plaintiffs were entitled to LAD.

Held, allowing the appeal with costs and setting aside the SCJ's decision

1. On the evidence adduced, the project was delayed due to Tenaga Nasional Bhd's ("TNB") failure in completing the electricity supply works within time during the construction of the factories. The defendant had successfully established that all the EOTCs were issued by JPC based on the opinion given by the defendant's architect. Thus, although the EOTCs were issued by JPC, they were valid under the SPAs and binding on the contracting parties as the EOTCs were based on the defendant's architect. The SCJ was plainly wrong in arriving at his decision and thus, it warranted appellate intervention. [*see p 642 para 11; p 643 para 17 - p 643 para 17; p 645 para 19*]

2. Notwithstanding the defendant had to deliver the vacant possession of the factories on or before December 16, 2015 as stipulated in the SPAs, the three EOTCs allowed the defendant to delay the performance of such obligation until the end of January 2017. When the defendant issued notices for delivery of vacant possession in October 2016, it was within the extended time allocated to the defendant. Thus, the plaintiffs were not eligible for the LAD. It was blatantly unfair for the defendant to be liable to pay the LAD when the delay in delivery was clearly not attributable to the defendant. Instead, TNB had admitted that the said electricity provider had delayed in completing the electricity supply works to the project and prevented the defendant from discharging its obligations under the SPAs within the stipulated time. [*see p 645 paras 21-22*]

Case(s) referred to by the court

Goh Bak Ming v Yeoh Eng Kong (and Other Appeals) [2018] AMEJ 0923; [2019] 3 MLRA 56 *(foll)*

Mah Sing Properties Sdn Bhd v Goh Leng Nguan @ Goh Ah Guan & 1 Lg (unreported), CA *(dist)*

Mah Sing Properties Sdn Bhd v Li Hong Mei (unreported), CA *(dist)*

Mah Sing Properties Sdn Bhd v Xing Da International Sdn Bhd (unreported), CA *(dist)*

Malaysia Land Properties Sdn Bhd (dahulunya dikenali sebagai Vintage Fame Sdn Bhd) v Tan Peng Foo [2013] 1 AMR 107; [2014] 1 MLJ 718; [2013] 3 CLJ 663, CA *(foll)*

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (pentadbir kepada harta pusaka Tan Ewe Kwang, si mati) & 3 Ors [2020] 8 AMR 227; [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC *(ref)*

Sinar TM Sdn Bhd v Mah Sing Properties Sdn Bhd (unreported), CA *(dist)*

Solicitors

Lee Chooi Peng, *Iris Lim* and *Victor Pang* (Justin Voon Chooi & Wing) for appellant
Emily Chong Wei Shing (HL Lee & Co) for respondent

Judgment received: August 17, 2023

Shamsulbahri Ibrahim J

Introduction

[1] For ease of reference, parties will be referred to as they were in the proceedings before the Sessions Court.

[2] This is the defendant's appeal against the decision of the Sessions Court judge ("SCJ") delivered on October 13, 2022 in which he allowed the plaintiffs' claims for liquidated ascertained damages ("LAD") with costs of RM15,000 to be paid by the defendant to each plaintiff.

Brief background

[3] As a brief background of facts, vide two sale and purchase agreements both dated December 16, 2012 ("SPAs"), the plaintiffs purchased two units of detached factories separately known as Lot Nos. D54 and D55 ("factories") respectively from the defendant. These factories are located within a project known as i-Parc@Tanjung Pelepas ("project").

[4] Pursuant to clause 15 of the SPAs, the defendant has to deliver the vacant possession ("VP") of the factories to the plaintiffs within 36 months from the date of the SPAs, failing which the defendant shall pay the LAD to the plaintiffs.

[5] The developer failed to deliver the VP of the factories within the stipulated deadline, i.e. on or before December 16, 2015. Nevertheless, the defendant only issued notices for delivery of VP on October 31, 2016 thereby causing a delay of 319 days. As such, the plaintiffs claimed against the defendant for LAD over the late delivery of VP of the factories. The defendant averred that the engineer of the project had granted the former three extensions of time ("EOT") pursuant to clause 20 of the SPAs until the end of January 2017. Since the VP of the factories was delivered on October 31, 2016 (that was well within the new extended timeframe), the defendant averred that the plaintiffs were not entitled for the LAD.

[6] On September 24, 2019, the plaintiffs filed the writ and statement of claim against the defendant for LAD on the ground that the latter failed to deliver the VP of the factories within 36 months from the date of the SPAs.

[7] During the trial at the Sessions Court, the plaintiffs brought two witnesses while the defendant called six.

[8] On October 13, 2022, the Sessions Court judge, in delivering the judgment, allowed the plaintiffs' claims against the defendant as follows:

(a) the defendant is to pay to the first plaintiff the LAD of RM205,407.07;

(b) the defendant is to pay to the second plaintiff the LAD of RM209,476.26;

(c) the defendant is to pay to the plaintiffs interest at the rate of 5% per annum on the amount due to the plaintiffs commencing from October 31, 2016 until the date of full settlement; and

(d) the defendant is to pay to the plaintiffs costs of RM15,000 each.

Status of the extension of time certificates issued by the defendant's engineer

[9] The crux of this appeal by the defendant is whether the extension of time certificates ("EOTCs") issued by the engineer to the former are valid pursuant to the SPAs. If the answer to the question is in positive, then whether the plaintiffs are still entitled for the LAD due to the delay in delivering the VP of the factories.

[10] The learned SCJ concluded that all EOTCs dated November 19, 2015, April 13, 2016 and August 19, 2016 issued by Jurutera Perunding Cekap ("JPC") to the defendant were not valid, wrong and defective as they were issued by an engineer who are not qualified to issue them under clause 20.1 of the SPAs. Instead, the learned SCJ held that only an architect was the qualified person to grant the EOT and not an engineer. The learned SCJ wrote as follows:

(15) Oleh itu, Mahkamah mendapati bahawa surat-surat lanjutan masa ("extension of time") ("EOT") yang dikeluarkan oleh Jurutera Perunding Cekap kepada Defendan yang bertarikh pada 19/11/2015, 13/4/2016 dan 19/8/2016 tersebut adalah tidak sah, tidak berkuatkuasa, salah dan defektif *disebabkan ianya dikeluarkan atau diisukan oleh Jurutera yang tidak mempunyai kelayakan untuk mengeluarkannya di bawah Klausa 20.1 Perjanjian-Perjanjian Jual Beli* yang bertarikh 16/12/2016 tersebut.

[11] To begin with, after perusing the notes of evidence, I find that there is no doubt that this project was delayed due to TNB's failure in completing the electricity supply works within time during the construction of the factories. This was admitted by Haji Mohmad bin Saikon ("SD2") who is Pengurus Kanan Perkhidmatan Pengguna TNB Johor Bahru and was in charge of the electricity supply to the project. In his witness statement (PSSD2A), SD2 explained about the problems faced by TNB in completing the electricity supply works as follows:

> 3.Q: Adakah terdapat apa-apa kelewatan oleh pihak Defendan dalam permohonan untuk bekalan elektrik bagi Projek ini?
>
> A: Tidak. Berdasarkan pengetahuan dan pengalaman saya serta berdasarkan dokumen-dokumen dalam kes ini, *saya nyatakan tiada apa-apa kelewatan oleh pihak Defendan*. Permohonan untuk bekalan elektrik bagi Projek ini yang dibuat oleh pihak Defendan adalah dalam tempoh masa yang dibenarkan dan lazim terpakai. Permohonan untuk bekalan elektrik telah diluluskan dan didaftar pada atau sekitar 20.1.2014. Jika ikutkan prosedur lazim TNB, biasanya dalam tempoh 6 bulan dan selewat-lewatnya pun dalam tempoh 12 bulan dari 20.1.2014, kerja-kerja TNB boleh disiapkan dan bekalan elektrik sepatutnya boleh disiapkan pada/sebelum Februari 2015. *Dalam kes ini, sememangnya terdapat kelewatan oleh pihak TNB kerana kekurangan bahan-bahan dan berkaitan dengan pentadbiran TNB dan ini adalah di luar kawalan pihak Defendan*.

[12] This TNB's problem was conveyed to Ng Hong Ling ("SD3") who is an architect at JYP Architects Sdn Bhd ("JYPA"). This architect company was the architect for the construction of the factories. SD3 testified that JYPA had sent reminders to TNB and held series of meetings with TNB on the latter's delay in completing the electricity supply works to the projects. Based on the admission by TNB in these meetings, SD3 was in the opinion that the delay of the project was solely due to the circumstance which was beyond the defendant's control.

[13] Later, SD3 issued a letter dated November 16, 2015 to Jurutera Perunding Cekap (JPC) stating his opinion about the cause of delay to the project and agreed that the EOT ought to be granted to the defendant as to the delivery of the VP of the factories. When being asked why he conveyed his opinion to JPC and not to the defendant, SD3 said that this was because JPC was in charge of electricity as the mechanical and electrical engineer for the project. Based on the opinion given by SD3, JPC later, pursuant to clause 20 of the SPAs, issued three EOTCs dated November 19, 2015, April 13, 2016 and August 19, 2016 to the defendant granting EOT in the delivery of VP of the factories until the end of January 2017.

[14] Now let me analyse the provisions in the SPAs on the issuance of EOTC. Clauses 15.1 and 20 of the SPAs say:

> 15.1 *Subject to* ***any extension or extensions of time as may be allowed by the said Engineer/Architect*** *(which such extension(s) of time shall be informed in writing to the Purchaser) pursuant to Clause 20 hereinbelow*, PROVIDED ALWAYS that the Purchaser shall have paid to the Vendor all instalments of the Purchase Price and any other monies payable under this Agreement as and when they become due and has not breached any of the other terms, conditions and stipulations herein, the said Property shall be completed (as certified by the said Engineer/Architect) and ready for delivery of vacant possession to the Purchaser within thirty-six (36) calendar months from the date of this Agreement.
>
> 20. *Force Majeure*
>
> 20.1 Notwithstanding anything to the contrary herein contained, *the Vendor shall not be liable for any loss or damage to the Purchaser for any failure to fulfill any of the terms of this Agreement if* ***in the opinion of the Vendor's architect*** *such fulfilment is delayed, hindered or prevented by force majeure including but not limited to* acts of God, strikes, lockouts, riots, civil commotion, general chaos, war, exceptionally inclement weather, land slide/slips, earthquake, fire, flood or *any other circumstances of whatever nature* ***beyond the control of the Vendor*** or by any reasons of the Purchaser requiring alterations or additions to the Property.
>
> 20.2 *The decision of the said* ***Engineer/Architect*** *to any extension(s) of time allowed by the said* ***Engineer/Architect pursuant to Clause 5.1*** *hereinabove due to such force majeure shall be final and binding upon parties hereto.*

[15] It is clear that either architect or engineer is authorised to grant any EOT under clause 15.1 of the SPAs. However, clause 20.2 of the SPAs refers to the words "engineer or architect" where it says that the decision of the engineer or architect to any extension of time allowed by the engineer or architect pursuant to clause 5.1 of the SPAs shall be final and binding upon the parties. Here, a question may be raised whether only the defendant's architect is authorised to grant an EOT as decided by the SCJ or either the architect or engineer?

[16] Upon reading the relevant clauses, I find that the SPAs authorise either the defendant's architect or engineer to grant any EOT if the defendant's architect is in the opinion that the defendant's delay in performing its duties is due to any circumstance which is beyond the latter's control.

[17] After scrutinising the notes of evidence, I find that the defendant has successfully established that all EOTCs were issued by JPC based on the opinion given by SD2 who is the defendant's architect. Thus, although the EOTCs were issued by JPC who was the defendant's engineer, I find that they

are valid pursuant to clause 20.1 of the SPAs and binding on the contracting parties as the EOTCs were based on the defendant's architect,.

[18] At this point, I find instructive the Court of Appeal case of *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2013] 1 AMR 107; [2014] 1 MLJ 718; [2013] 3 CLJ 663 where it was stated by Mah Weng Kwai JCA in the following passage:

> [12] *The court is of the view that the certificate is final and conclusive and binding on the respondent* for the following reasons:
>
> (a) to begin with, cl. 22.1 of the Sale and Purchase Agreement envisaged and provided for extension of time to be granted by the architect in situations deemed appropriate by the architect;
>
> (b) notwithstanding that time shall be the essence of the Sale and Purchase Agreement (cl. 8), cl. 22.1 *clearly gave the power to grant extension of time to the architect for good reason;*
>
> (c) *the force majeure clause (cl. 30) is not limited to the general notion of delay caused by "act of God, strikes, lockouts, riots, civil commotion, general chaos and inclement weather" only. The words force majeure have been held in many cases to have a more extensive meaning than "act of God" or "vis major".* While the concept of *force majeure* does not encompass conditions of business or economic climate leading to a depressed economy, it would include dislocation of business by various actions and events. (See *Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2003] AMEJ 0225; [2007] 1 LNS 54);
>
> (d) …
>
> (e) …
>
> (g) *the court is of the view that in light of the certificate, it is deemed conclusive that the reasons for the delay in the completion and delivery of vacant possession of the unit are as stated in the certificate. The court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of inter alia, fraud, misrepresentation or mala fides.* It is trite that the court should not intervene to rewrite the terms and conditions of the Sale and Purchase Agreement willingly accepted by the respondent when it entered into the agreement with the appellant;
>
> (h) …
>
> (i) …
>
> (k) while the court is mindful that a party relying on a *force majeure* clause must prove the facts bringing the case within the clause (see *Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd* [2004] AMEJ 0114; [2004] 1 LNS 537), the court is of the view that in the present case the facts relied on by the architect

are as contained in his report summary. It is because of the existence of the final and conclusive and binding clause that the court is constrained from determining the reasons proffered by the architect in detail. *Suffice to say that unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with mala fides, the certificate will have to be accepted by the court*;

[19] In the premise of the foregoing, I find that the SCJ is shown to be plainly wrong in arriving at his decision and thus, this warrants an appellate intervention by this court.

Whether the plaintiffs are entitled for the LAD due to the delay in delivering the VP of the factories

[20] Clause 15 of the SPAs clearly states that the defendant would not be liable to pay any loss or damage (or LAD in this case) once its architect was in the opinion that the defendant's delay in delivering the VP of the factories was due to the circumstance which was beyond the defendant's control.

[21] Although the defendant had to deliver the VP of the factories on or before December 16, 2015 as stipulated in the SPAs, the three EOTCs allowed the defendant to delay the performance of such obligation until the end of January 2017. When the defendant issued notices for delivery of VP on October 31, 2016, it is clear that the VP was within the extended time allocated to the defendant and thus, the plaintiffs are not eligible for the LAD.

[22] Further, it is my considered view that a fair-minded judge should look at all circumstances of the case before penalising a party who is allegedly breaching any particular contract. It is blatantly unfair for the defendant to be liable to pay the LAD when the delay in delivering the VP of the factories was clearly not attributed by the defendant. Instead, TNB had admitted that the said electricity provider had delayed in completing the electricity supply works to the project and prevented the defendant from discharging its obligations under the SPAs within the stipulated time.

Court of Appeal's decisions in previous suits involving the defendant

[23] During the hearing of this appeal, learned counsel for the plaintiffs averred that prior to the plaintiffs' filing of this suit, many other purchasers in the project have commenced suits against the defendant for LAD, four of which had been brought before the Court of Appeal:

(a) W-04(NCvC)(W)-448-09/2018 between Mah Sing Properties Sdn Bhd and Xing Da International Sdn Bhd ("*Xing Da*");

(b) J-04(W)-13-01/2018 between Mah Sing Properties Sdn Bhd and Goh Leng Nguan @ Goh Ah Guan & 1 Lagi ("*Goh Leng Nguan*");

(c) J-04(NCvC)(W)-552-11/2018 between Sinar TM Sdn Bhd and Mah Sing Properties Sdn Bhd ("*Sinar TM*"); and

(d) J-08-81-03/2020 between Mah Sing Properties Sdn Bhd and Li Hong Mei ("*Li Hong Mei*").

[24] According to the plaintiffs, in the above suits the reasons for delay stated in the EOTC are similar as in the present suit and the Court of Appeal rejected the defendant's defence and gave judgment in favour of the purchasers.

[25] On this issue, I find that the grounds of judgment for the above suits were not attached by the plaintiffs for this court's perusal. Nevertheless, based on the SCJ's grounds of judgment in the case of *Xing Da*, I find that the relevant architect was not called by the defendant to testify at the trial. As such the SCJ found that the defendant failed to prove that the EOTC given by it was based on the opinion of the architect as required by the agreement.

[26] In the case of *Goh Leng Nguan*, the magistrate found that the EOTC was not justified as both the architect and officer from TNB were not called to give evidence at the trial. Whereas in the case of *Sinar TM*, although the representative from TNB was called to testify at the trial, the defendant did not call the relevant architect to confirm that he opined that an EOT should be given to the defendant. As such, the magistrate rejected the EOTC issued by the architect.

[27] In the case of *Li Hong Mei*, the magistrate found that the defendant failed to produce any proof of posting to prove that the notices of EOT were sent to the purchaser.

[28] As alluded to earlier, although the facts and issues in those cases are almost similar, the evidence adduced before the Sessions and Magistrates' Courts then are totally different from the present case. As such, all four Court of Appeal cases referred to by the plaintiffs are distinguished and the decision therefrom should not be treated as a binding precedent.

Conclusion

[29] As decided in *Goh Bak Ming v Yeoh Eng Kong (and Other Appeals)* [2018] AMEJ 0923; [2019] 3 MLRA 56 that the appellate court should not interfere with the finding of the court below unless that court is shown to be plainly wrong in arriving at its decision or there has been no or insufficient judicial appreciation of the evidence.

[30] In *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 8 AMR 227; [2020] 12 MLJ 67; [2020] 10 CLJ 1, Zabariah FCJ when delivering the judgment of the court had said:

> [148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the "plainly wrong" test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. *As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.*

[31] Having considered the facts and the circumstances of the present appeal, I find that the Sessions Court judge erred in interpreting the relevant provisions of the SPAs and the established evidence in rejecting the EOTCs issued by the defendant's/appellant's engineer and subsequently allowing the plaintiff's claim for the LAD. Thus, I allow the appellant's appeal with costs and the Sessions Court judge's decision is set aside.