IN THE HIGH COURT OF MALAYA AT SEREMBAN
IN NEGERI SEMBILAN
[CIVIL SUIT NO: NA22NCVC-27-04/2019]

BETWEEN

MEGA 99 HOUSING SDN BHD **... PLAINTIFF**

AND

MOHD SAFFUAN ABDUL KUDUS
(As Executor for the estate of Abdul Kudus bin Abdullah, deceased) **... DEFENDANT**

Contract

GROUNDS OF JUDGMENT

INTRODUCTION

[1] The plaintiff in this case was a developer. It sought to specifically enforce a joint venture agreement dated 31 October 2013 that it had entered into with the defendant's father. This agreement is referred to in this judgment as the *"JVA"*.

[2] After a trial of the action, I dismissed the plaintiff's claims. The reasons for my decision are set out here.

Material background facts

[3] The plaintiff. Mega 99 Housing Sdn Bhd, entered into the JVA to develop two plots of land. The defendant's late father, Abdul Kudus bin Abdullah, was the registered proprietor of the lands. Abdul Kudus had initially been named as the defendant in the action, but sadly he passed away before trial commenced. His estate was represented by his son, En Mohd Saffuan, For the purposes of this judgment, I refer to En

Abdul Kudus and his estate (as represented by En Mohd Saffuan) collectively as the "defendant".

[**4]** Under the joint venture, the plaintiff, which was a developer, was to construct dwellings on the two plots of land that were the subject matter of the JVA. The defendant would be entitled to a certain percentage of the houses built. The defendant was also paid a sum of RM400,000 upon execution of the JVA, which was to be deducted from the proceeds of sale of the units that were to be allocated to the defendant as landowner. The terms of the JVA also provided for a deadline by which certain regulatory approvals needed to be obtained in respect of the lands. The plaintiff obtained the planning permission for Lot 6037 but not for Lot 6035. Planning permission for Lot 3067 was obtained on 14 September 2015.

[5] The terms of the JVA specified the deadline of 36 months after the signing of the JVA for certain regulatory approvals to be obtained, i.e. before 31 October 2016. On 9 March 2016, the plaintiff sought and obtained an extension of time from the defendant for one year until 31 October 2017.

[6] On 1 November 2018 the defendant, through his solicitors, purported to terminate the JVA, on the basis that there had been a failure by the plaintiff to adhere to (among others) clause 8 of the JVA, which provided for the deadline within which certain approvals were to be obtained.

[7] The plaintiff then commenced this suit, seeking (among others) for an order for specific performance. The plaintiff was of the view that it had fulfilled its obligations under the JVA and that accordingly the defendant was not entitled to terminate the JVA.

ANALYSIS

[8] The case turned almost entirely on the proper construction of the terms of the JVA, in particular clause 8 providing for the deadline for certain regulatory approvals relating to the development.

[9] Under the terms of the JVA, the plaintiff as the developer paid the defendant the sum of RM40Q,000 as a refundable sum which was to be deducted from the proceeds of sale of units that were described as being the entitlement of the defendant. The JVA provided that 24% of the layout as approved by the relevant authorities would be the entitlement of the defendant as the landowner.

[10] The JVA anticipated that the development of the lands would be conducted in phases. There was no precise definition of what constituted a "phase", although it appeared that it was up to the discretion of the plaintiff as the developer to make a determination as to what each phase of development would comprise. Clause 9.1 of the JVA provided for certain timelines to be adhered to by the plaintiff in constructing the units that formed the entitlement of the defendant as the landowner.

[11] Clause 8 of the JVA dealt with the deadline for regulatory approvals. Clause 8.1 specified that certain approvals needed to be obtained within 36 months of the date of the agreement, i.e. before 31 October 2016. This date was extended to 31 October 2017 by agreement of the parties. If the developer failed to obtain the approvals before such date, the agreement would terminate, and there would be no further right or obligations between the parties. In such event, the defendant would be entitled to forfeit the RM400,000 that had been paid by the plaintiff at the inception of the JVA.

[12] The dispute between the parties turned almost entirely on what precise approvals needed to be obtained by the plaintiff within the approval period of 36 months. Clause 8 of the JVA read as follows:

8. PERIOD FOR OBTAINING APPROVALS

8.1 The Developer shall apply and obtain the approval for the conversion and layout, building plan for the 1st phrase of development) and infrastructure plan of the said Lands (hereinafter referred to as "the Approvals") within thirty six (36) months from the date of this Agreement (hereinafter referred to as "the Approval Period").

8.2 In the event that the Developer fails to obtain any of the Approval hereof despite the extension of the Approval Period (if any) being granted by the Landowner, then this Agreement shall be terminated with no right or liability being attached to either party and thereafter the Issue Document of Title to the said Lands and all other documents deposited by the Landowner under this Agreement shall be returned to the Landowner with the Landowner's interest intact.

8.3 In the event of the occurrence of situation stated in clause 8.2 hereinabove mentioned, the monies referred to in clause 2.1 hereto shall be forfeited and the Land Owner shall not be obligated under this Agreement to refund the said sum to the Developer.

[13] As explained above, the plaintiff obtained the planning permission for Lot 6037. Conditional planning permission was obtained on 14 September 2015, more than a year before the expiry of the original approval period of 36 months specified in clause 8,1, No approvals were applied for or obtained in respect of Lot 6035. This much was not in material dispute between the parties.

[14] The plaintiff was of the view that, because it had obtained conditional planning approval for Lot 6037, it was not in breach of its obligations under clause 8.1, and that the termination of the JVA by the defendant was unlawful.

[15] The defendant took a different view. According to the defendant, the reference to the "said Lands" meant that the approval for the infrastructure plan needed to be obtained for both Lots 6035 and 6037. Because the infrastructure plan approval was not obtained in respect of Lot 6035, the defendant contended that he was perfectly entitled to treat the JVA as at an end, and to forfeit the sum of RM400,000 in accordance with the provisions of clause 8.3.

[16] The object of the exercise of construction of a contract is to ascertain the meaning of the contract to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The test is thus an objective one; it does not matter what a party had in fact thought that a particular clause meant. The question is what would a reasonable person in the position of that party would have understood by the provision in question.

[17] The first observation that may be made was that there appeared to be a missing opening parentheses in Clause 8.1. The absence of the opening bracket, while an inconvenience, did not in my judgment hamper the exercise of construing the contract. (The expression "phase" was also misspelt as "phrase".)

[18] In my considered view, it was clear that the words "for the 1st phase of development" merely applied to the building plans. The approval for the conversion, layout and infrastructure plan, by contrast, needed to be obtained for both Lots 6037 and 6035. This was because of the use of the expression "said Lands", which is defined in clause 1.1 to refer to both lots of land.

[19] In other words, according to clause 8.1 of the JVA, the plaintiff would have needed to obtain the following approvals by the extended deadline of 31 October 2017:

(a) the approval for the building plans for the first phase of the development (which was Lot 6037); and

(b) the approvals for the conversion, layout and infrastructure plan for both Lots 6037 and 6035.

[20] As explained above, it was not in dispute that no approvals had been obtained for Lot 6035. This meant that plaintiff was in breach of its obligations under clause 8.1. That this was so was clear from the plain reading of clause 8.1.

[21] This construction of the JVA is also consistent with the testimony of the lawyer who had prepared the JVA, Mr Tan Chim Kwai (DW3). Mr Tan testified that there was indeed a missing parenthesis after the words "building plan" in the first line of clause 8.1. Mr Tan had acted for the plaintiff in preparing the JVA, and thus even if there was any ambiguity in clause 8.1, such ambiguity ought to be resolved in favour of the defendant based on the *contra proferentum* rule. However, in this case, as explained above, it was clear despite the missing bracket, that there had been a failure by the plaintiff to obtain the fulfilment of the conditions specified in clause 8 of the JVA within the extended deadline of 31 October 2017.

[22] The analysis above addresses the following four arguments raised by counsel for the plaintiff:

(a) it was contended that there was an agreement between the parties for Lot 6037 to be developed first.

I was satisfied that the parties had intended for development of the two lands be undertaken in phases, and that the manner in which the phases were to be demarcated was a matter left to the discretion of the plaintiff as the developer. Nonetheless, the express words of Clause 8 clearly and plainly required certain approvals to be obtained within the period specified, as extended by the agreement of the

parties. These approvals included, for instance, the approval for the infrastructure plan for Lot 6035, which was not obtained by the deadline of 31 October 2017;

(b) it was contended that the plaintiff had obtained all the regulatory approvals within the agreed timeline.

This was patently not the case, for the same reasons explained in the preceding paragraph;

(c) it was contended that the plaintiff had substantially fulfilled its material obligations under the JVA.

Here again, this contention was not made out, as the requirements of clause 8.1 had not been fulfilled, for the reasons explained *ante;* and

(d) finally, it was argued under the terms of the JVA, the completion of the project was to be attained within a period of 10 years.

Although clause 9 of the JVA provided for a period of 10 years for completion of the units that were described as the Landowner's Units, there was a separate obligation under clause 8.1 for the plaintiff as the developer to obtain certain regulatory approvals. This obligation had not been fulfilled by the plaintiff.

[23] In the following paragraphs, I address two additional arguments that were raised by counsel for the plaintiff:

(a) it was contended that time was not of the essence under the JVA; and

(b) it was further argued that the notice of termination issued by the defendant contravened the provisions of the JVA.

Whether time was at large

[24] There were two reasons advanced for the plaintiff in support of the contention that time was no longer of the essence under the JVA:

(a) first, it was argued that, because the defendant had agreed to extend the deadline under clause 8.1 by one year to 31 October 2017, therefore time was at large.

This contention, in my respectful view, was a *non sequitur*. It is plain and obvious that it was because of the very fact that time was of the essence that it became necessary to seek an extension of time. The grant of the extension of time cannot be said, without more, to constitute a waiver of the defendant's right to insist that the new deadline be adhered to. If this were the case, then there would not have been any need to specify a new deadline for compliance with the obligations under clause 8.1;

(b) secondly, it was argued that the defendant had waived his rights to insist on the strict adherence of the deadline under clause 8.1 by reason of the existence of the following two letters:

(i) on 22 February 2018 (which was after the extended deadline), the plaintiff wrote a letter to the defendant (see B1/32 of the trial bundles) informing him of certain timelines for various stages of construction.

In my judgment; this letter by its own terms could not constitute an agreement on the part of the defendant to either grant a further extension or to waive his rights to insist on strict adherence to the agreed deadline. It was merely a unilateral pronouncement by the plaintiff of its own intention. The fact that En Mohd Saffuan, En Abdul Kudus's son, acknowledged receiving the

letter did not mean that the letter constituted an agreement on the part of En Abdul Kudus.

It is also pertinent to observe that the plaintiff had not in fact adhered to the timelines that it had specified in the 22 February 201S letter, because construction had not started by the time the defendant purported to terminate the JVA in November 2018;

(ii) on 17 April 2018, the defendant signed a letter of undertaking (see B1/33 of the trial bundles) under which he agreed to execute the sale and purchase agreements (as the registered proprietor for Lot 6037} for the terraced and town houses that was to be subsequently sold to the end-purchasers.

In my view, this letter of undertaking related only to the houses that were to be built on Lot 6037. Forthe letter of undertaking to override the clear terms of the JVA, there must be unequivocal language to this effect. There were none in the letter of undertaking.

[25] I was thus not persuaded that the defendant had waived his rights to insist on adherence to the extended deadline of 31 October 2017.

Notice of termination

[26] It was advanced for the plaintiff that the termination notice issued by the defendant did not adhere to the provisions of the JVA. Counsel argued that, pursuant to clause 14.2(a)(ii) of the JVA, the defendant was required to give 30 days' notice to the plaintiff for the breach to be remedied. Because the notice of termination purported to effect immediate termination of the JVA, it was argued that the termination was unlawful.

[27] I was unable to agree with this submission, for two reasons:

(a) first, on a true construction of clause 8.2, it provided for the automatic termination of the JVA in circumstances where the requisite regulatory approvals were not obtained within the specified deadline; and

(b) secondly, the failure to adhere to the deadline was not a breach that was remediable within the meaning of clause 14,2(a)(ii), and hence no requirement arose for the plaintiff to be given a period of 30 days to remedy its breach.

[28] These points are explained in the following paragraphs.

[29] Under the terms of Clause 8,2, upon the failure of the plaintiff (as the developer) to obtain the necessary approvals within the stipulated deadline, the JVA is expressed to be terminated without the necessity of any further action on the part of the landowner:

> ... then this Agreement shall be terminated with no right or liability being attached to either party...

[30] The JVA does not provide for a right of the landowner to exercise its right of termination in such circumstances. In other words, based on the proper construction of the JVA, clause 8.2 provided for the automatic termination of the JVA, and no further need arose for the defendant to issue a notice of termination.

[31] Now, even if this were not the case, the failure to adhere to a deadline under the JVA is not a breach that is capable of remedy. Once a deadline is breached, the defaulting party cannot go back in time to remedy the breach. This would be true of each contractual obligation that is subject to a deadline for its performance.

[32] For instance, if a party is in breach of, say, a financial covenant, this would be a breach that is capable of being remedied. Where, however, it fails to perform an obligation within a contractually stipulated deadline, the subsequent performance by it of the obligation

does not remedy that breach, because the time for its performance has passed.

[33] Clause 14.2(a) of the JVA provides as follows:

> 14.2 Subject to Clause 15 hereof, the Landowner is entitled to issue a notice to the Developer terminating this Agreement, at any time;
>
> (a) the Developer commits any breach of any of this obligations under this Agreement which either;
>
> (i) is incapable of remedy; or
>
> (ii) if capable of remedy, is not remedied within thirty (30) days of it being given notice so to do;

[34] A breach of an obligation that must be performed within a certain time is clearly a breach that is incapable of remedy. It would not be possible for the plaintiff in this case to turn back the clock to obtain the necessary approvals. Thus even if the approvals are obtained at some future point, it does not change the fact that the there has been a prior breach of the obligation.

[35] Lord Reid in *L. SchulerA.G. v. Wickman Machine Tool Sales Ltd*[1] explained the distinction between remediable and non-remediable breaches in the following terms:

> It appears to me that clause 11 (a) (i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word 'remedy.' It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future, I think that the latter is the more natural meaning. The

[1] [1974] A.C. 235

> word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place, and in general it can only be In a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again.

[36] By this analysis, the breach of the obligation under clause 8,1 of the JVA gave rise to a right of the defendant to issue a notice of termination pursuant to clause I4.2{a)(i) of the JVA. No notice was required to allow the plaintiff to remedy the breach, for the reason that the breach was not one that was capable of remedy.

[37] For these reasons, I was of the view that the JVA had not been wrongfully terminated by the defendant.

Whether the plaintiff can claim for benefits accruing to the defendant

[38] Now, I fully understood and appreciated that the plaintiffs had proceeded to obtain the requisite approvals for the development of Lot 6037, and that earthworks have also been carried out for this lot. It was therefore undeniable that the defendant had accrued a benefit from the work done by the plaintiff. It was advanced for the plaintiff that it should be compensated for the benefit that has accrued to the defendant.

[39] I was not unsympathetic to this view. However, the plaintiff had proceeded in this claim premised solely and entirely on its contractual claim, and had not sought to claim for unjust enrichment. Clause S.2 of the JVA makes it clear that, in the event that any of the approvals specified was not obtained within the approval period, then the JVA would be terminated "with no right or liability being attached to either party". This meant that the plaintiff was precluded by the terms of the JVA from claiming in respect of any of the work that it had already carried out in pursuance of the JVA.

[40] The plaintiff's claim was thus dismissed in its entirety, with costs of RM30,000, subject to allocatur.

Dated: 14 FEBRUARY 2023

(Azizul Azmi Adnan)
Judge
High Court
Seremban

Counsel:

For the plaintiff - Sharif Mohamed & Nurliyana Azis; M/s Sharif St Khoo

For the defendant - Alex Gan & Nurhamimie Farhana; M/s Vilasiny Gan & Co