IN THE HIGH COURT OF MALAYA IN JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM
[CIVIL APPEAL NO: JA-12ANCvC-30-10/2020]

BETWEEN

1. ERA UNIVERSE DEVELOPMENT SDN BHD
[Company No: 201401009891 (1085970-T)]

2. MARSLAND DEVELOPMENT SDN BHD
[Company No: 201401011437 (1087513-W)]

... APPELLANTS

AND

1. TANG TWANG LOI

2. LAU TENG TIONG ... RESPONDENTS

[IN THE SESSIONS COURT AT JOHOR BAHRU
IN THE STATE OF JOHOR DARUL TA'ZIM, MALAYSIA
WRIT NO: B52NCvC-16-02/2020

BETWEEN

1. TANG TWANG LOI

2. LAU TENG TIONG ... PLAINTIFFS

AND

1. ERA UNIVERSE DEVELOPMENT SDN BHD
[Company No. : 201401009891 (1085970-T)]

2. MARSLAND DEVELOPMENT SDN BHD
[Company No. : 201401011437 (1087513-W)]
... DEFENDANTS]

GROUNDS OF JUDGMENT

Introduction

[1] This is the Respondents' application for security for costs in enclosure 7 pursuant to section 580A of the Companies Act 2016, and the inherent jurisdiction of this Court pursuant to Order 92 rule 4 of the Rules of Court 2012 ("Rules of Court"). The incidental reliefs prayed for included the striking out of the Appellant's appeal (against the decision of the learned Sessions Court Judge in ordering summary judgment against them), in the event that the Appellants failed to comply with the order for payment of security for costs.

[2] In response thereto, the Appellants filed an application in enclosure 11 to strike out the application for security for costs, pursuant to Order 18 rule 19 of the Rules of Court.

[3] Both applications in enclosures 7 and 11 were heard and addressed together. For ease of reference, the Appellants and Respondents are referred to respectively as the Defendants and Plaintiffs.

The background facts

[4] Both Defendants are private limited companies incorporated in Malaysia. The First Defendant is the developer for a mixed housing and commercial project known as Bandar Alam Masai ("the said Project") whilst the Second Defendant is the registered landowner of the said Project.

[5] The Plaintiffs were the individual purchasers who had entered into a Sale and Purchase Agreement ("SPA") with the Defendants on 18 April 2016. There was a delay in delivery of vacant possession, and as a result thereof, the Plaintiffs terminated the SPA in November 2019. The Plaintiffs then filed a civil suit in the Sessions Court ("the Suit") for recovery of their payments made to the First Defendant, and on 23 September 2020, had obtained summary judgment against the Defendants. As a result thereof, the Defendants appealed.

[6] On 5 November 2020, the Plaintiffs filed an application in enclosure 7 for security for costs ("the Plaintiffs' application"). In response thereto, on 25 November 2020, the Defendants filed an application in enclosure

[11] ("the Defendants' application") to strike out the Plaintiffs' application. I allowed the Plaintiffs' application and dismissed the Defendants' application, for the following reasons.

Contentions, evaluation, and findings

Enclosure 11

[7] At the outset, the Defendants argued that the Plaintiffs' application should be struck out pursuant to Order 18 rule 19 of the Rules of Court, which reads:

Order 18 – *Pleadings*

Rule 19 – *Striking out pleadings and endorsements*

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)*(a)*.

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[8] In their submission, the Defendants had raised technical issues regarding several aspects of the Plaintiffs' affidavits. In my view, these objections were merely procedural and had to be dismissed since there was no prejudice whatsoever to the Defendants. Furthermore, I was disinclined to allow procedural skirmishes to prevail over substantive justice, in light of Order 1A of the Rules of Court, which reads:

Order 1A – *Court or judge shall have regard to justice*

> Rule 1A – *Regard shall be to justice*
>
> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[9] I also found the Defendants' application misconceived, as what the Defendants had sought to strike out was a notice of application, whereas Order 18 rule 19 of the Rules of Court, which the Defendants had relied upon is confined to pleadings and petitions, and does not extend to notices of application. This was made clear in *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886, through Abdul Malik Ishak J (as he then was), in the following passage:

> It is apparent that this order was designed specifically to weed out claims that are clearly unfounded and the rationale behind this Order has been described lucidly by Tan Sri Chang Min Tat, a former Judge of the Federal Court, in *Mallal's Supreme Court Practice*, 2nd edn, vol. 1 at p. 219 as follows:
>
> > This rule enforces the rules of pleading. The court has the power (i) in a summary manner, i.e. without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious or it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the

court to allow amendments of any pleading in addition to the powers under Order 20.

[Emphasis added.]

[10] In any event, it is crucial to note that although the Defendants' application was filed on 25 November 2020 to strike out the Plaintiffs' application in enclosure 7, the Defendants themselves had responded to the Plaintiffs' affidavit-in-support of enclosure 7, and raised the same issues as they did in their affidavit-in-support of enclosure 11. By doing so, the Defendants had admitted that the Plaintiffs had a sustainable case, which warranted full ventilation of issues at the hearing of the Plaintiffs' application.

[11] It was, therefore, a futile exercise for the Defendants to embark on a separate action of filing an application strike out the Plaintiffs' application. In my view, such exercise was redundant and a waste of judicial time, which the Court took a dim view of, as the Defendants' application also amounted to a duplicity of proceedings, and was thus 'frivolous or vexatious' and an 'abuse of the process of the Court' as described by Ramly Ali JCA (as he then was) in *See Thong & Anor v. Saw Beng Chong* [2013] 3 MLJ 235, and in *Shahizul Helmi Sharani @ Rohan v. Angkatan Tentera Malaysia & Ors* [2017] 1 LNS 1005.

[12] In light of the fact that a striking out application can be allowed only 'when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable': per Mohamed Dzaiddin SCJ (as he then was) in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, [1993] 3 MLJ 36, it was obvious that there was no such case, since the issues raised in the Defendants' application were issues that

needed to be ventilated, which they had done, in resisting the Plaintiffs' application.

[13] In the final analysis, 'so long as the Plaintiffs' application raised some questions fit to be decided by the Court, 'the mere fact that the case was weak, and not likely to succeed, was no ground for striking out….In these circumstances, the plaintiffs should not be summarily deprived of his opportunity to argue their case:' per Low Hop Bing JCA in *Dato' Raja Ideris Bin Raja Ahmad & Ors v. Teng Chang Khim & Ors* [2012] 5 MLJ 490.

[14] As such, the Defendants' application was dismissed.

Enclosure 7

The applicable law

[15] With regard to the Plaintiffs' application, the issue that arose was which law was applicable. Whilst the Plaintiffs contended that section 580A of the Companies Act applied, the Defendants submitted that the Court's power was limited to Order 23 rule 1 of the Rules of Court. The provisions read:

> **Companies Act 2016**
>
> Section 580A – *Security for costs*
>
> (1) Where a company is the plaintiff in any action or other proceedings and if it appears by a credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in his defence, the Court may order the plaintiff

to give sufficient security for all the costs and to stay all action or proceedings until the security is given.

(2) The Court may direct the costs of any action or proceedings to be borne by the party to the action or proceedings.

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Rules of Court 2012

Order 23 – *Security for costs*

Rule 1 – *Security for costs of action*

(1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or originating summons or is incorrectly stated therein; or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then, if, having regard to all the circumstances of the case, the Court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

[16] The Defendants argued that section 580A of the Companies could not apply as they were not plaintiffs in this case. In my view, the same principle in section 580A of the Companies Act should apply to Defendants as they were the Appellants. Hence, I agreed with the Plaintiffs' submission that section 580A of the Companies Act was the relevant provision, as it was specific. In any event, the Court's power to order security for costs was also derived from Order 92 rule 4 of the Rules of Court, which reads:

Order 92 – *Miscellaneous*

Rule 4 – *Inherent powers of the court*

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[17] On this note, I found instructive the case of *Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Berhad & Anor* [2017] MLRHU 1619, where it was stated by Mohd Nazlan Ghazali J, in the following passage:

It is worthy of emphasis that the crux of the matter is the plaintiff has failed to comply with an Order of the Court on the payment for security for cost. Such a failure is the premise upon which the Court is empowered to move to dismiss the action of the party in default. In as much as the

> power to order security for cost is premised on the inherent jurisdiction of the Court and not merely conferred by legislative prescriptions (see for example the judgment of Lord Esher MR in *In Re Semenza* [1894] 1 QB 15), the power to dismiss an action by reason of the default by the party ordered to make payment similarly derives from the inherent jurisdiction of the Court and applies as much to an Order made pursuant to Order 23 r. 1 of the Rules of Court 2012.
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> [Emphasis added.]

Contentions, evaluation, and findings

[18] At the outset the Defendants submitted that there was a delay by the Plaintiffs in filing their application.

[19] I was unable to agree with this contention as the Plaintiffs' application was filed on 5 November 2020, which was only a month after the Defendants had filed their appeal. After taking into account the fact that a formal request for security for costs had to be made first, it was untenable for the Defendants to contend that there was any such delay in the filing of the Plaintiffs' application.

Whether there was a duplicity of proceedings

[20] The Defendants contended that the Plaintiffs' application was a duplicity of proceedings since they had already filed the same application in the Sessions Court, which was dismissed.

[21] I found the Defendants' argument bereft of merit, since that application was for security for costs for the Defendants'

counterclaim, whereas in the present case, the Plaintiffs' application was for security for costs for the Defendants' appeal. The two applications were filed on entirely different bases altogether.

Whether Defendants were unable to pay

[22] The crux of the issue in the Plaintiffs' application, therefore, was whether the Defendants were unable to pay the costs of the Plaintiffs, and whether such inability appeared by credible testimony.

[23] The Plaintiffs had produced the Companies Commission of Malaysia ("CCM") search results of the Defendants, wherein the Summary of Financial Information indicated that the First Defendant had incurred a net loss of over MYR47 million, whilst the Second Defendant had incurred a net loss of MYR8,496. The Defendants, on the other hand, had neither disclosed their financial standing, nor did they adduce any evidence to rebut the CCM search results. These facts amounted to credible evidence that the Defendants were unable to pay the Plaintiffs' costs should the Defendants lose their appeal.

[24] I was guided by the cases of *Stamford College Bhd v. Iris Corp Bhd* [2014] 8 MLJ 178, and *RHB Bank Bhd v. Bactra Properties Sdn Bhd & Ors (No 2)* [2011] 1 MLRH 130, where in those cases, the provision in question was section 351 of the Companies Act 1965 (which is in *pari materia* with section 580A of the Companies Act 2016). In the latter case, it was stated by Hasnah Mohammed Hashim JC (as she then was), in the following passage:

> [19] In the present case, the question is simply whether or not it is just to order security for costs? In the present case the 1st defendant there is no evidence before this court which enables it to assess the 1st defendant's current financial position. The 1st defendant in its affidavit in reply failed to show that the 1st defendant had sufficient funds or asset in the event the claim is unsuccessful. No statement of affairs, accounts of 1st defendant was exhibited…
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> …
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> [22] Guided by the principles enunciated in all the cases mentioned above I come to the conclusion that there should be security for costs and therefore encl. 62 is allowed with cost to the plaintiff/applicant.
>
> [Emphasis added.]

[25] The failure of the Defendants to rebut the CCM search results was compounded by the undisputed fact that the Defendants had failed to settle certain sums of money owing as a result of the judgment and costs obtained against them by the Plaintiffs at the Sessions Court, and in an earlier related appeal at the High Court. Since the Defendants had not obtained a stay of execution of the said judgment and order, this, in my view, amounted to a wanton disregard of the orders of Court, leading to the inference that the Defendants lacked the financial ability.

Whether the Plaintiffs had met the threshold of proof

[26] The Plaintiffs contended that pursuant to section 580A of the Companies Act, their threshold of proof was met as long as the

Defendants' inability to pay the costs of the appeal proceedings, appeared by credible testimony.

[27] The issue that needed to be addressed was the interpretation of the word 'appears' in section 580A of the Companies Act. In *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158, the Court of Appeal, in quoting with approval the Supreme Court of India's decision in *Pyare Lal Bhargava v. State of Rajasthan* AIR 1963 SC 1094, concluded that the interpretation of the word 'appears' was 'a reasonable well-founded belief based on some circumstances which arouse suspicion of the fact.'

[28] The word 'appears' in section 580A of the Companies Act was also interpreted in the case of *Stamford College Bhd v. Iris Corp Bhd* [2014] 8 MLJ 178, as denoting 'a lesser degree of probability than normally required in terms of proving a particular assertion', and that the word 'appears by credible testimony' is not the same as 'credible testimony.'

[29] As prescribed by the Court of Appeal in *Skrine & Co v. MBF Capital Bhd & Anor* [1998] 3 MLJ 649, it is necessary for the Court to conduct a two-stage inquiry – the first is for the court to determine whether there is credible evidence, and secondly, is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs in the event it was unsuccessful.

[30] In my view, the CCM search results, and the failure to pay the judgment sum and costs awarded by the courts as alluded to above, constituted sufficient credible testimony that the Defendants would be unable to pay the Plaintiffs' costs if the Appeal was dismissed.

[31] In any event, the Court's power to order security for costs is discretionary, and in exercising such discretion, it must have regard to the circumstances of the case to determine whether security for costs should be granted. This is supported by several cases including *Wan Muhamad Ibrisam bin Wan Ibrahim, Mechanalysis Sdn Bhd (In Liquidation)*, and *Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd (In Liquidation)* [1998] 3 MLJ 820.

[32] In *Wan Muhamad Ibrisam bin Wan Ibrahim & Ors v. Opal Pyramid Sdn Bhd* [2008] 6 MLJ 728, in administering a reminder that the discretion of the Court should not be hampered, it was stated by Suriyadi Halim Omar JCA, in the following passage:

> [17] It is quite clear from all the above authorities that the concept of likelihood of winning has no place at all in an application for security for costs before a judge. The prerequisite is that there is credible testimony before the judge and that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence. The discretion ought not to be hampered by any new formulated concepts that tend to import inhibitive demands into s. 351 of the Companies Act 1965.
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> [Emphasis added.]

[33] I also found instructive the case of *Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd (In Liquidation)* [1998] 3 MLJ 820, where the Court, in adopting the English case of *Keary Developments Ltd v. Tarmac Construction Ltd & Anor* [1995] 3 All ER 534, stated as follows:

The matters that the court should take into account when deciding whether to order security for costs are set out in *Keary Developments Ltd v. Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 at pp 539-540, viz:

(1) As was established by this court in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273; [1973] QB 609 , the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

(2) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

(3) The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.

(4) In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see *Porzelack KG v. Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at p 423, per Browne- Wilkinson V-C). In this context, it is relevant to take account of the conduct of the litigation thus far, including any open offer or

payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

(5) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v. William Irwin (South) & Co Ltd* [1991] BCC 726).

[34] In this case, the discretion of the Court had to be exercised in favour of the Plaintiffs, since they should, as purchasers, have some measure of protection against the Defendants who, as Developers, had judgment entered against them in the Sessions Court, and who had not paid the judgment sum and costs awarded therein.

Conclusion

[35] In dealing with security for costs, I am mindful that access to justice is a fundamental guarantee under the Federal Constitution, and that the Court should give ‘a right of hearing at all stages and not to create obstacles by reason of security for costs, in particular to the poor, needy and oppressed:’ per Hamid Sultan JCA in *Ling Khee Ming v. Ling Shew Kue @ Ling Chai Yuen* [2018] 1 LNS 1139.

[36] Hence, after judicious consideration of all the evidence before this Court, both oral and documentary, and submissions of

parties, in the interest of justice, the Plaintiffs' application was allowed with the order for only MYR20,000 to be paid by the Defendants within 28 days (instead of MYR40,000 to be paid within 14 days as sought by the Plaintiffs).

Dated: 17 AUGUST 2021

(EVROL MARIETTE PETERS)
Judicial Commissioner
High Court, Johor Bahru

COUNSEL:

For the plaintiffs/respondents - Tan Vincent; M/s Tan Vincent & Azmi

For the defendants/appellants - Tseng Seng Guan; M/s Lai & Associates

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7, [1993] 3 MLJ 36

Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Berhad & Anor [2017] MLRHU 1619

Dato' Raja Ideris Bin Raja Ahmad & Ors v. Teng Chang Khim & Ors [2012] 5 MLJ 490

Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd (In Liquidation) [1998] 3 MLJ 820

Keary Developments Ltd v. Tarmac Construction Ltd & Anor [1995] 3 All ER 534

Ling Khee Ming v. Ling Shew Kue @ Ling Chai Yuen [2018] 1 LNS 1139

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886

Pyare Lal Bhargava v. State of Rajasthan AIR *1963 SC 1094*

See Thong & Anor v. Saw Beng Chong [2013] 3 MLJ 235

Shahizul Helmi Sharani @ Rohan v. Angkatan Tentera Malaysia & Ors [2017] 1 LNS 1005

Skrine & Co v. MBF Capital Bhd & Anor [1998] 3 MLJ 649

Stamford College Bhd v. Iris Corp Bhd [2014] 8 MLJ 178

RHB Bank Bhd v. Bactra Properties Sdn Bhd & Ors (No 2) [2011] 1 MLRH 130

Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v. Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158

Wan Muhamad Ibrisam bin Wan Ibrahim & Ors v. Opal Pyramid Sdn Bhd [2008] 6 MLJ 728

Legislation referred to:

Companies Act 1965, s. 351

Companies Act 2016, s. 580A

Rules of Court 2012, O. 1A, O. 18 r. 19, O. 23 r. 1, O. 92 r. 4