

DALAM MAHKAMAH TINGGI MALAYA D1 KUALA LUMPUR

BAHAGIAN SIVIL

GUAMAN NO. S1-22-1109-207

ANTARA

**KUMPULAN KERJAYA BHD
(Receiver and manager appointed)
(In Liquidation)**

.....PLAINTIF

DAN

**1. RIBARU BINA SDN BHD
(Formerly known as Ribar Resources
Sdn Bhd)**

2. Ribar Permai Development Sdn Bhd

.....DEFENDAN

GROUND OF JUDGMENT

This is with regards to the 1st and 2nd Defendants' application to strike out the Plaintiff's Writ of Summons and Statement of Claim herein.

The Plaintiff's claim against the First Defendant is frivolous, vexatious, embarrass and/or an abuse of the process of the Court. Among the reasons of the first Defendant's application are :

(a) The Plaintiff does not have locus standi to institute this action against the First Defendant because the Plaintiff had been wound up. The action was commenced by the Plaintiff's Receiver and Manager for and on behalf of the Plaintiff without first obtaining the leave of the Court and consent of the Liquidator .

(b) The Plaintiff's action against the First Defendant is statute barred. The Plaintiff's claim against the 1st Defendant was founded on a contract i.e. Deed of Settlement dated 8/4/1999.

(c) Even if the action of the Plaintiff against the 1st Defendant was founded on an allegation of fraud, the particulars of fraud had not been particularized in the pleadings or the alleged fraud did not exist / arise in this case or not related to this case.

Background Facts

On 1.4.2996 and 20.6.1996, the 1st Defendant entered into 2 agreements with the Plaintiff as Sub-Contractor for the:

- i) construction and completion of one (I) block of a 10 storey condominium on Lot P.T. 7628, Off Jalan Ipoh, Mukim Batu, Kuala Lumpur (hereinafter referred to as Package 2.1”) on the terms and condition stated therein;
- ii) Construction and completion of 126 units of medium cost condominium on Lot P.T 7628, Off Jalan Ipoh, Mukim Batu, Kuala Lumpur (hereinafter referred to as “Package 2.3”) on the terms and conditions stated therein.

Plaintiff claims that all the works in Package 2.1 and 2.3 had been completed.

Subsequently the Plaintiff and the 1st Defendant entered into a Deed of Settlement dated 8.4.1999 whereby the 1st Defendant agreed to pay the Plaintiff up to the amount of RM 1,700,000.00 (intended settlement amount”) and the Plaintiff had agreed to accept the intended settlement amount from the 1st Defendants, by way of contra of properties and cash, in full and final settlement of the amount outstanding and payable to the Plaintiff in respect of the completion of Package 2.1 and Package 2.3.

Pursuant to the Deed of Settlement, it was agreed that the settlement amount shall be paid to the Plaintiff in the following manner by way of contra of properties and cash payment:

A. Properties

Within fourteen (14) days from the date of execution of the Deed of Settlement, the 1st Defendant shall execute and/ or cause the 2nd Defendant and/or Agibs (M) Sdn Bhd (“ AMSB”) (AMSB for property (b)(below) to execute all relevant documents to effect the transfer of the following properties in favour of the Plaintiff and to procure from all parties the relevant undertakings and/or confirmations:-

- (a) Four (4) units of Permai Ria Condominium 2.3, Jalan Ipoh, Kuala Lumpur held under Master Title: HS(D) 69501, PI 10094, Mukim Batu, Daerah Kuala Lumpur (Agreed Value RM620,000.00).

(b) Two (2) units of Terrace House at Taman Bukit Katil held under Master Title Advance Certificate of the Title Holding No. 1090, Mukim Bukit Katil (Agreed Value RM 310,000.00).

(c) Vacant Land at Lot PT 10114, Taman Batu Permai, Jalan Ipoh, Kuala Lumpur held under Pajakan Negeri: 14638, No Lot 49961, Mukim Batu (Agreed Value RM150,000.00).

(d) One (1) unit of Shop Lot at PI 10102, Taman Batu Permai, Jalan Ipoh, Kuala Lumpur held under HS(D) 69509, No. VI 10102 (Agreed Value Rm 150 000) .

(Properties (a) to (d) are hereinafter collectively referred to as the "Contra Properties").

Contra Properties Total Agreed Value RM 1,230,000.00

B.Cash

RM470,000.00 in accordance with the mode of payment as stipulated in the Deed of Settlement.

Subsequently after the Deed of settlement, on 14.2.2000 the Plaintiff was placed under receivership by BSN Commercial Bank Berhad and a Receiver and Manager was appointed.

On 16.8.2000, the Plaintiff was wound up pursuant to a court order dated 16.8.2000 and a Liquidator was appointed for the Plaintiff.

The Suit herein was instituted by the Receiver and Manager for and on behalf of the Plaintiff and under the name of the Plaintiff in accordance with the exercise of his powers as the Receiver and

Manager as provided in the Debenture dated 21.10.1999 and 28.10.1999.

Issue of Locus Standi

The Issue is whether the Plaintiff's Receiver and Manager has the power to bring any action or legal proceeding in the name and on behalf of the company that has been wound up by virtue of the provision(s) relating to the exercise of his powers as the Receiver and Manager.

In this case, the Plaintiffs Receiver and Manager was appointed under the Debenture dated 21.10.1999 and the Supplemental Debenture dated 28.10.1999 ('the Debentures'). Therefore the Receiver and Manager was the agent of the Plaintiff company, as expressly stated in Section 10.03 of the Debenture dated 21.10.1999 (Encl. 15, exhibit "MYL-2"). But, upon the winding up of the Plaintiff, the agency of the Receiver and Manager has been terminated.

The case of ***Kimlin Housing Development Sdn Bhd v Bank Bumiputera Malaysia Bhd & Ors*** [1997] 3 CLJ 274 succinctly reiterates this point where Edgar Joseph Jr in delivering the judgment of the Federal Court states thus:

“Because a receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument is by definition (see s. 4(1)(b) of the Act) an officer of the corporation and all officers of a corporation whether past or present, are obliged under pain of prosecution under s. 300(l)

of the Act, to deliver up to the liquidator appointed by the Court or as he directs (i) if all the moveable and immovable property of the corporation in his custody or under his control or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s. 300(l)(b (i) and (ii)), the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer.”

The same proposition was followed in ***Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & 2 Ors*** [1999] 1 LNS 103 where it was held that:-

".....the persons who purported to be Receivers and Managers of the plaintiff company had no power to commence the summons after liquidation had been ordered in respect of the Plaintiff company...The power of instituting any suit is at the discretion of the liquidator - the power is his and he cannot delegate it."

Section 236 (2) of the Companies Act 1965 grants powers to the Liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company.

Applying *Kimlin* and *Kosmopolitan Credit & Leasing Sdn Bhd*'s cases to the Suit herein, it was commenced by the Receiver and Manager for and on behalf of the Plaintiff company in exercising his powers of

the Receiver and Manager contained in the Debentures. The plaintiff had submitted that the powers of the Receiver and Managers were derived from the Debentures. This is correctly so and the Receiver and Manager are the agent of the Plaintiff company were set out in Section 10.03 of the Debenture dated 21/10/1999. However this agency had been terminated when Plaintiff company was wound up on 16/8/2000. Therefore the powers of the Receiver and Manager as agent of the Plaintiff came to an end on 16.8.2000.

Therefore the Receivers and Managers has no locus standi to commence this action against the First Defendant. This power now lies with the Liquidators as clearly provided under section 236(2)(a) of the Companies Act 1965.

The Plaintiff submits that the Plaintiff was placed under receivership first with the appointment of the Receiver and Manager on 14.2.2000, before it was subsequently wound-up on 16.8.2000. Under the law and powers contained in the Debentures, the Receiver and Manager acting in the name and on behalf of the Plaintiff has the locus standi to commence the action herein notwithstanding the Plaintiff is a company which has been subsequently wound up.

The Plaintiff further submits that Section 10.08 of the Deed of Debentures grants an irrevocable power of Attorney to the Receiver and Manager, to commence any legal proceeding in the name and on behalf of the Plaintiff in so far as it relates to the property of the Plaintiff, as in the matter herein. Based on this provision in the Debentures, the Plaintiff submits that the Plaintiff's Receiver and

Manager does not require the consent from the liquidator nor leave from Court before this action is commenced.

A perusal of the Plaintiff's Statement of Claim does not state that the action was commenced by the Receiver and Manager in the capacity as well as in the exercise of his powers as the Attorney. Paragraph 3 of the Statement of Claim pleads that the action was commenced in accordance with the exercise of his powers as the Receiver and Manager only. This reliance on the power of attorney clause in the Debenture is only raised in the Plaintiff's Affidavit in Reply.

The rule of pleadings is that parties are bound by their pleadings and hence the Plaintiff cannot depart from the averment in the Statement of Claim.

As far as the powers of the Receivers and Managers and the Power of Attorney are concerned, these 2 powers are provided in 2 separate sections in the Debentures i.e 10.03 and 10.08 respectively. Therefore these 2 powers are separate and distinct.

A further point to note is that section 10.08 [h] of the said Debenture states that the Plaintiff company appointed the Attorney to act in the company's name and on behalf of the company and to perform the acts inter alia to commence all actions and other legal proceedings and demands "touching any matters aforesaid". This means that the power to commence action as stated in section 10.08 of the said Debenture is limited to matters relating to or mentioned in the said Debenture only and not to any other type of cases.

I agree with the submission of the 1st Defendant's counsel that the Deed of Settlement was not mentioned in the Debenture as matters which the Attorney could act on behalf of the Plaintiff company and hence does not fall under matters "touching any matters aforesaid". Therefore, the said Debenture does not confer power on the Attorney to institute action relating to the Deed of Settlement.

Whether Plaintiff's claim was statute barred

The Plaintiff submits that the Plaintiff's claim is premised mainly on the wrongful and fraudulent transfer of the the contra properties under the Deed of Settlement to third parties, thereby depriving the Plaintiff of the ownership of the contra properties. Therefore the Plaintiff is claiming for the proceeds of the wrongful transfer of the contra properties. Therefore the Plaintiff contends that his action is for the recovery of the proceeds of the sale of the land and as far as this action is concerned the limitation period is 12 years and Plaintiff is still within the time period of filing its claim against the Defendants. (Refer to section 21 of the Limitation Act 1953).

I disagree with the contention of the Plaintiff. From the Statement of Claim, essentially, the Plaintiff's claim herein is a result of the alleged failure of the 1st Defendant and the 2nd Defendant to execute a transfer of the properties to the Plaintiff as stated in the Deed of Settlement.

Therefore, the Plaintiffs action against the First Defendant was founded on breach of the Deed of Settlement.

The Deed of Settlement was executed on 8.4.1999. Under the Deed of Settlement, the First Defendant was to execute all relevant documents to transfer the properties to the Plaintiff within fourteen (14) days from 8.4.1999, i.e. latest by 21.4.1999. Thus 21.4.1999 is the date of the breach by the 1st Defendant which is the date of the when the cause of action arose.

The Writ of Summons was filed on 24.9.2007, which was more than 8 years from the cause of action arose and therefore, the Plaintiff's claim was clearly statute-barred by virtue of section 6(1)(a) of the Limitation Act 1953 which states that action founded on contract shall not be brought after the expiration of 6 years from the date on which the cause of action arose.

Since limitation has set in, the Plaintiff's action is frivolous, vexatious and/or amounts to an abuse of the process of court. See: Enc. 18, para 7.

Issue of Fraud

This issue of fraud has some link with the issue of limitation of action as the Plaintiff submits that the Plaintiff's claim is not statute barred as it's claim is premised upon the claim of fraud by the Defendants.

The alleged fraudulent act by the Defendants was the wrongful and fraudulent transfer of the the contra properties under the Deed of Settlement to third parties, thereby depriving the Plaintiff of the ownership of the contra properties.

On a perusal of the Statement of Claim, the Plaintiff had failed to particularised the fraudulent act by the 1st Defendant. The alleged sale of the lands were after the Deed of Settlement was executed. This does not amount to fraud, but more of a breach of the Deed of Settlement by the 1st Defendant.

Further a point to note is that, if the assertion of the Plaintiff is to be believed i.e. that the claim is on the proceeds of the sale of the land, this would involved third parties whereby Plaintiff is not privy to. The Plaintiff can however use the proceeds as a means to assess its damages in the event the court decides that there is indeed a breach by the 1st Defendant as to the Deed of Settlement when the land was not transferred to the Plaintiff as agreed.

It is also to be borne in mind that for the allegation of fraud the burden of proof is beyond reasonable doubt in civil cases. (Refer to the case of Yong Tim v Hoo Komj Chong & Anor [2005] 3 CLJ 229). As far as the allegation of fraud by the Plaintiff is concerned was based on documents which are not clear as to the dates of transactions. (Refer to Enclosure 22 para 7 (h)).

Moreover the alleged transactions as to the lands happened several years after the alleged breach of the Deed of Settlement (i.e. 22.4.1999) there cannot be fraud committed by the Defendants. As was rightly pointed out by the Defendant's counsel that the Deed of Settlement did not specify which particular units in Permai Ria Condominium were to be assigned or transferred to the Plaintiff

although the Plaintiff identified which 4 specific units of condominium from specific blocks in their Statement of Claim and affidavits.

The Plaintiff's action as against the 2nd Defendant

As far as the issue of locus standi and the limitation period is concerned the same argument for the 1st Defendant will apply for the 2nd Defendant.

The Deed of Settlement was executed between the 1st Defendant and the Plaintiff. The 2nd Defendant was not a party to the Deed of Settlement. There is no privity of contract between the Plaintiff and the 2nd Defendant.

Based on the above reasonings, the 1st and the 2nd Defendant's application application in Enclosure 12 and 10, to strike out the Plaintiff's Statement of Claim is allowed with costs as it is frivolous, vexatious and an abuse of courts process.

Datin Zabariah Mohd Yusof

Tarikh 3.7.2009