

from the Deposit being reimbursement for loss of profit for the Plaintiff in delivering the management of the Property to the Defendant prior to full settlement of the Purchase Price pursuant to Clause 9 (2) the Agreement.

- (f) Court Order that the balance of the Deposit after deduction of 10% of the Purchase Price as liquidated damages amounting RM 568,161.00 pursuant to Clause 9(1) of the Agreement and after deduction of reimbursement for loss of profit for the Plaintiff in delivering the management of the Property to the Defendant prior to full settlement of the Purchase Price for the aforesaid Property of RM 2,600.00 per acre amounting RM1,342,926.00 pursuant Clause 9 (1) of the Agreement to be deposited with Plaintiff's solicitor stakeholder pending trial.

BRIEF FACTS

There are 3 Sales and Purchase Agreement (SPA) entered into between the Plaintiff and the Defendant for the Lands in question.

The Defendant had paid 50 % of the purchase price as deposit and in lieu of that the Plaintiff has handed over the management (not the vacant possession) of the said Lands to the Defendant pursuant to clause 18 (1) of the 3rd Agreement.

The Defendant was supposed to pay the balance purchase price within 3 months from the date of the SPA with one month extension of time if necessary. Besides, there was a memorandum of extension of time dated 10.2.2006 executed by both parties but the Defendant never seek enforcement of the same.

The Defendant had failed to pay the balance purchase price within time pursuant to section 4 (2) and (5) of the SPA and also after extension was granted until 8.1.2007 on a goodwill basis. In addition, the Defendant had chopped off 393 mahogany trees on the Lands without the consent of the Plaintiff.

Subsequently, the Plaintiff issued a notice of termination and the delivery of management of the Lands dated 8.1.2007 to the Defendant but the Defendant had failed or refused to redeliver the management of the lands upon expiration of the said Notice.

The Courts Findings

The Plaintiff in this case is asking for a mandatory injunction.

The power of the Court to grant mandatory injunction is provided in Sections 53 of the Specific Relief Act 1950 which states:

“When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion to prevent the breach complained of and also to compel performance of the requisite acts.”

It is trite law that the granting of interlocutory mandatory injunction demands a higher standard than the test stated in the ***American Cyanamid*** case. (See ***MBf Holdings Bhd v. East Asiatic Company (Malaysia) Bhd*** [1995] 4 CLJ 73.

The landmark case was ***Shepherd Homes Ltd v Sandham*** [1971] Ch 340, where Megarry J said that an interlocutory mandatory injunction should not be granted, save in an “unusually sharp and

clear case". The relevant passage in ***Shepherd Homes Ltd v. Sandham*** is from the judgment of Megarry J which is as follows:

"In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

However Hoffmann J in ***Films Rover International v Cannon Film Sales Ltd*** [1987] 1 WLR 670 had reformulated the correct principle in these words:

" The passage quoted from Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, qualified as it was by the words 'in a normal case', was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as 'mandatory' will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a 'high degree of assurance' that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline of 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about

the plaintiffs chances of establishing his right, there cannot be any rational basis for withholding the injunction."(emphasis mine)

This approach has been applied in Malaysia and in Singapore. See, ***BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd*** [2000] 2 MLJ 70; ***Thomas M Heysek & Anor v Boyden World Corp*** [1989] 1 MLJ 219; ***Shamsudin bin Shaik Jamaludin v Kenwood Electronics***

In our case here the Defendant have failed to settle the balance purchase price pursuant to section 4 (2) and (5) of the SPA, and this constitutes a fundamental breach of the SPA which entitles the Plaintiff to terminate the SPA. (Refer to ***Fu Kau Chering & Another v Chew Kean Chong*** [1997] 5 CLJ 187.

Furthermore, pursuant to Clause 9 of the SPA, if the Defendant fails to settle the balance of the purchase price, the Plaintiff shall be entitled to terminate the said SPA.

The defendant had refused to surrender the management of the Lands to the Plaintiff pursuant to section 16 of the SPA upon termination of the same. Clearly the plaintiff have a good arguable case against the defendant.

There is also a high degree of assurance that at the trial it will appear that this injunction granted in this case is rightly so. It is therefore an unusually a sharp and a strong case against the defendant, to warrant a mandatory injunction being granted.

If the injunction is not granted the Plaintiff would suffer greater harm as the defendant had refused to redeliver the management of the land to the plaintiff after the termination of the SPA, in that the trees and crops which are on the lands would be damaged as there are evidence to show that some mahogany trees have been fallen by the Defendants.

Compensation is definitely not an adequate remedy for the Plaintiff as this involves immovable properties whereby the Defendant have continued to occupy the Lands despite the termination of the SPA and reaping the profits of the produce of the lands which consists of oil palms trees and mahogany trees. If injunction is not granted the Defendant would continue to cause damage to the trees and these trees needs years to be replanted and nurtured before they mature and ripe for harvesting. Therefore the damage caused certainly cannot be compensated with costs.

The Defendant however would be adequately compensated under the Plaintiff's undertaking as to damages if Plaintiff fails in the trial.

A further point to note is that the Defendant has no defence to the present case. The defendant had failed to settle the balance purchase price within the time even after extension was granted. There was no positive response from the Defendant after the notice of termination and the notice to redeliver the management of the land was issued. The defendant only applied to the bank for Loan 5 months after execution of the SPA whereby the defendant was only offered loan by HSBC Bank On 3.4.2007 after the ex

parte injunction was granted. Refer to the case of Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors Suit No K22-27-1994)

Therefore based on the reasons above I grant the order as per prayers (a) (b) (c), (d), (e), (j) and costs in the cause.

Datin Zabariah Mohd Yusof

Tarikh 19.6.2009