

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S4-22-1476-2007

BETWEEN

SEDIABENA SDN BERHAD

.....PLAINTIFF

AND

1. IJM CORPORATION SDN BHD

2. TORSCO SDN BHD

.....DEFENDANT

GROUND OF JUDGMENT

This is the Plaintiff's application for Specific Performance pursuant to 0 81 RHC 1980, of an alleged Agreement entered into between the Plaintiff and the 2nd Defendant on 29.10.2007/ damages in lieu of or in addition to Specific Performance.

Plaintiff's Contention

The 2nd Defendant is the registered and beneficial owner of the entire land known as Lot 11004, 8 km Jalan Lahat, 31500 Lahat, Perak measuring about 23,351 and covered steel fabrication factory (lithe Factory") measuring about 7,000 square meters in area ("the Land").

There were emails, letters and meetings between the Plaintiff's Managing Director, Chew Wai Choy ("Chew") and the 2nd Defendant's Director, Mah Teck Oon ("Mah") on the sale of the Land.

In particular, through an email dated 29.10.2007 from Mah to Chew, the 2nd Defendant agreed to sell the Land to the Plaintiff for RM7.7 million.

The correspondence and documents collectively formed a binding agreement between the parties.

The 2nd Defendant breached the alleged Agreement by subsequently increasing the purchase price for the Land to RM8.5 million on 5.11.2007.

The 2nd Defendant's defence

The 2nd Defendant disputes the Plaintiff's version of events, and contends as follows:

The 2nd Defendant was the registered and beneficial owner of only a 1215/1615 share in the Land ("the 2nd Defendant's Share"), which is only 3/4 of the Land. The 2nd Defendant was never the registered and beneficial owner of the entire Land as alleged by the Plaintiff.

The negotiations between Chew and Mah were for the sale of the 2nd Defendant's Share only, and not for the sale of the entire Land as contended by the Plaintiff.

The purchase price of RM7.7 million was a preliminary offer made by Mah for the sale of the 2nd Defendant's Share and not an unequivocal offer for the sale of the Land as alleged by the Plaintiff.

At the time the negotiations were taking place between Mah and Chew, there existed a long-standing and intense boundary dispute between the 2nd Defendant and the registered owner of the remaining 400/1615 share in the Land, Kok Chee Engineering Sdn Bhd ("KCE"), which had yet to be resolved. Hence, the entire Land could never have been the subject matter of the negotiations between Mah and Chew.

His preliminary offer was subject to discussions with the 2nd Defendant's corporate lawyers.

Through a telephone conversation on 5.11.2009, Mah informed Chew that the price for the 2nd Defendant's Share (and not for the entire Land as alleged by the Plaintiff) had increased to RM 8.5 million. Mah was entitled to do this as there was no concluded and binding contract between the parties.

The Court's Findings

There are 2 issues which are the subject of disputes in this application which are as follows:

- a) The subject matter of the sale was 1215/1615 share of the said land and not the whole of the said Land;

- b) The offer made by the Defendant is subject to further discussion with their corporate lawyers;
- c) Whether there is certainty as to the terms and conditions of the sale of the land to constitute a binding contract between the parties

The subject matter of the sale was 1215/1615 share of the said land and not the whole of the said Land

The 2nd defendant contends that the identity of the land is in dispute, therefore there is no certainty as to the subject matter of the alleged agreement.

I disagree with the contention of the 2nd Defendant There was no dispute regarding the identity of the land in question. At all material times both parties had knowledge of the following:

- a) the description of the said land was in accordance to the site plan provided by the 2nd Defendant as reflected in exhibit CWC-2 of Enclosure 4;
- b) the site plan clearly shows that the said land did not include the small plot of land owned by Kok Chee Engineering Sdn Bhd.

The intention of both parties was for the sale transaction of the land without the small plot which was owned by Kok Chee Engineering Sdn Bhd.

Therefore I do not see any dispute as to the identity of the said land.

The offer made by the Defendant is subject to further discussion with their corporate lawyers.

From the facts, there was a meeting on 26.10.2007 where negotiations were made as to the purchase of the said land. During the meeting there was a written offer of RM 8 million for the land by Mah to Chew. This preliminary offer was rejected by Chew. There were further negotiations between the parties whereby Mah made another offer of RM 7.7 million and an early entry on the land. At that time Mah said he needed to obtain approval and confirmation from his management and revert back to Chew by email on 29.10.2007.

On 29.10.2007 Chew Wai Choy received a confirmation from Mah Teik Oon which states that the Defendant have agreed on a purchase price of RM 7.7 million and granted to the Plaintiff early entry on the land. From the email in exhibit CWC-3 of enclosure 4, it is clear that the Defendant have agreed on the purchase price of RM 7.7 million on an "as is where is" basis.

I do not agree with the contention of the Defendant that the contents of the email at exhibit CWC-3 seems to suggest that it is subject further to discussion with their corporate lawyers, for the following reasons:

- a) If that is so, the contents would have been worded differently, the "price agreed" would not have been mentioned;

- b) Defendant would not have granted to the Plaintiff early entry on the said land, if the deal have not been concluded;
- c) This issue was not shown to have been raised at the meeting of 26.10.2007 ; or made known to the Plaintiff during the said meeting; or raised in any of the emails between the parties;
- d) Besides the identity of the parties, identity of the land and the purchase price of the said land, what else could there need to be further discussed with the corporate lawyers of the 2nd Defendant. It is the norm that after all the terms have been agreed, a lawyer is roped in to draw up the SPA in accordance with the terms, unless there is some legal issues involved, which in this case there has not shown to be any.
- e) If what the D 2nd Defendant is saying is true, that there had not been any concluded contract between the parties, and the Defendant is still considering to take up other offers, then there is no necessity to even call in the lawyers just yet. The fact that the lawyers were called in, shows that parties have concluded their negotiations.

Refer to the case of **Rossiter v Miller** [1878] 3 A.C. 1124 where the Court held that a binding contract had been formed despite a formal deed have not been executed. In **Percy Trentham Ltd v Archital Luxfer Ltd** [1993] 1 Lloyd's Rep 25 where Steyn LJ in deciding that whether the parties had made a binding contract stated that "the governing criterion is the reasonable expectations of honest men,"

and “the yardstick is the reasonable expectations of sensible businessmen.”

Therefore from the contents of the email dated 29.10.2007, it is a confirmation of a valid offer by the 2nd Defendant and acceptance by the Plaintiff, and hence there is a valid and binding agreement between the Plaintiff and the Defendant.

(3) Whether there is certainty as to the terms and conditions of the sale of the land to constitute a binding contract between the parties.

In our case there is already certainty as to parties, the subject matter and the purchase price, which according to exhibit CWC-3 had been agreed upon by the Defendant. These are essential terms to a contract and although there is no formal contract drawn up, there is sufficient clarity in the essential terms to form a concluded contract between the parties. (Refer to ***Charles Grenier Sdn Bhd v Lau Wing Hong*** [1996] 3MLJ 327.

At present, the land in question had been sold by the Defendant to a third party on 29.11.2007, therefore there is a breach committed by the Defendant. Consequently to order for specific performance on the contract would not be viable, I hereby order that damages for the breach would be the appropriate order in lieu of specific performance, of which the damages is to be assessed by the Registrar.

Therefore, I grant order in terms of Enclosure 3 prayer (4) to be assessed by the Registrar and prayer (6). Costs to the Plaintiff.

Datin Zabariah Mohd Yusof

Tarikh : 15.6.2009

Bagi Pihak Plaintiff : Encik Ashok Kumar Ranai & Shannan Rajan
Tetuan Skrine

Bagi Pihak Defendant : Sheila Lingam & Denice Tan
Tetuan Soosay Dhillon Sharma