

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S6-22-1370-2003

BETWEEN

1.PENLINE ART SUPPLIES SDN BHD

2.CHEH CHOOI JING

.....PLAINTIFFS

AND

PLAZA RAKYAT SDN BHD

.....DEFENDANT

GROUND OF JUDGMENT

This is the Plaintiffs' application under 014A to determine legal issues without full trial.

After careful consideration of the written submissions and authorities submitted by both parties, I find that the case is suitable to be disposed off on points of law pursuant to Order 14A RHC.

Facts:

The First and Second Plaintiffs, as purchasers, entered into two Sale and Purchase Agreements of the same terms and conditions with the Defendant as the Vendor Developer and Datuk Bandar Kuala Lumpur as the Proprietor, both dated 1-11-1995 (collectively "Sale and Purchase Agreements). The two Sale and Purchase Agreements are respectively marked as items 1 and 2 in the Bundle of Documents (pages 1-64).

Pursuant to the said Sale and Purchase Agreements, the First Plaintiff agreed to purchase a parcel of commercial unit known as Lot No L4-040, Level 4, Plaza Rakyat Shopping Mall ("First Plaintiff's Unit") while the Second Plaintiff agreed to purchase Lot No L4-039, Level 4, Plaza Rakyat Shopping Mall ("Second Plaintiffs Unit"). Progress Invoices were issued by the Defendant up to Stage 3.

The First Plaintiff paid a total of RM 123,282 and the Second Plaintiff paid a total of RM 105,462 to the Defendant without any delay.

Subsequently, the Defendant stopped construction on the First and Second Plaintiffs' Units and in fact on the whole of Plaza Rakyat Shopping Mall until to-date prompting the First and Second Plaintiffs to commence the present action against the Defendant.

Questions of Law To Be Determined

- 1) Are the First and Second Plaintiffs' claims premature?
- 2) (a) Are the liquidated damages calculated based on the purchase price of the First Plaintiffs' Units or based on the total sum paid by the First and Second Plaintiffs for the First and Second Plaintiffs' Units as at 4-9-2003 (the filing date of the Writ and Statement of Claim)?

(b) Are the First and Second Plaintiffs entitled to liquidated damages, even though the First and Second Plaintiffs have not been required by the Defendant to fully settle the total purchase prices for the First and Second Plaintiffs' Units?
- 3) Are the First and Second Plaintiffs allowed to set-off the liquidated damages from the balance purchase price?

The Court's findings

1(a) Are the First and Second Plaintiffs' claims premature?

Section 6.04 of the Sale and Purchase Agreements provides as follows:

'Subject to Section 9.06 hereof, the Premises shall be completed by the Vendor and vacant possession delivered to the Purchaser within thirty-six (36) calendar months from the date of this Agreement. If the Vendor fails to deliver vacant possession of the Premises within the time stipulated herein, the purchaser shall grant to the Vendor an extension of a further twelve (12) months period ("Extension Period") from the expiry of the aforesaid period of thirty six (36) months Provided That if the Vendor shall fail to deliver vacant possession of the Premises before the expiry of the Extension Period then the Vendor shall pay to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on the Purchase Price from the day immediately following the expiry of the Extension Period until date of delivery of vacant possession of the Premises to the Purchaser or deemed delivery in accordance with Section 6.05.'

The last date for delivery of vacant possession would be 4 years after the date of the Sale and Purchase Agreements on 1-11-1995, which is due on 31-10-1999. The Defendant's failure to complete the First and Second Plaintiff's Units until even now, is a breach and hence there is a cause of action against the Defendant.

(b) When does the cause of action accrue

The cause of action on contract runs from the breach of contract, which limitation period would have commenced regardless of whether any damage is suffered or whether such damage is

suffered later. (Refer to **Gibbs v Guild** (1881) 8 QBD 296: Sia **Siew Hong v Lim Gim Chian** [1995] 3 MLJ 141)

Section 6.04 clearly states that “ the Vendor shall pay to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on the Purchase Price from the day immediately following the expiry of the Extension Period until the date of delivery of vacant possession of the Premises to the Purchaser or deemed delivery in accordance with Section 6.05”.

To interpret the clause in such a way that the Plaintiff would have to wait until the property is delivered vacant possession before claiming for liquidated damages (LAD) is untenable because:

- it would caused hardship to the Plaintiffs.
- It would be encouraging unending procrastination on the part of errant developers as the obligation to pay liquidated damages would only arise upon vacant possession delivered. I do not think this is the correct interpretation.
- The defendant is abusing its own breach as a defence to the Plaintiffs’ rightful claim.
- The Defendant cannot be allowed to keep the monies paid by the purchaser and at the same time refusing to complete the project, as otherwise it would have to pay liquidated damages to the Plaintiff.

The Plaintiffs are entitled to claim LAD from the date of the breach until the date of delivery of vacant possession.

Therefore the cause of action in this case runs from 31.10.1999.

The claims by the Plaintiffs are therefore not premature.

2 (a) Are the liquidated damages calculated based on the purchase price of the First Plaintiffs' Units or based on the total sum paid by the First and Second Plaintiffs for the First and Second Plaintiffs' Units as at 4-9-2003 (the filing date of the Writ and Statement of Claim)?

Section 6.04 of the SPA states that “.....Vendor shall pay to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum on the Purchase Price.....”

Therefore liquidated damages is calculated at 10 % per annum on the purchase price.

Section 2.01 of the Sale and Purchase Agreements provides that "Purchase Price" means the "amount indicated in Column IV of the First Schedule". Column IV of the First Schedule set out its meaning as the full amount of the purchase price.

The liquidated damages is calculated based on the total purchase price of the First and Second Plaintiffs' Units.

2(b) Are the First and Second Plaintiffs entitled to liquidated damages, even though the First and Second Plaintiffs have not been required by the Defendant to fully settle the total purchase prices for the First and Second Plaintiffs' Units?

Section 6.04 of the SPA states that the Defendant must pay liquidated damages immediately upon its failure to deliver vacant

possession to the Plaintiffs within the time period stipulated therein.

There is no pre-condition set anywhere in the provision that full purchase price must have been settled to entitle the Plaintiffs to claim liquidated damages from the Defendant.

3. Are the First and Second Plaintiffs allowed to set-off the liquidated damages from the balance purchase price?

This is allowed because the Plaintiffs claim for liquidated damages arises out of the same transaction and is closely connected with the demand by the Defendant for the balance of the purchase price. (Refer to the case of ***S.E.A. Housing Corporation Sdn Bhd v Lim Poh Choo*** [1982] 2 MLJ 31).

Following from the above, therefore the Court orders the following:

In favour of the First Plaintiff:

Purchase price of property – RM 410,940

- a) LAD from 1.11.1999 (last date for delivery of vacant possession) to 31.10.2002 (3years).

RM 410,940 x 10% x 3 years = RM 123, 282.

- b) LAD from 1.11.2002 to 4.9.2003 (date of writ)

= 9 months & 4 days

= 274 days.

$$\text{RM } 410,940 \times 10 \% \times \frac{274}{365}$$
$$= \underline{\text{RM } 30,848.65}$$

c) Total = (LAD from 1.11.1999 to 4.9.2003)

$$= \text{RM } 123,282 + \text{RM } 30,848.65$$

$$= \text{RM } 154,130.65$$

Thereafter LAD at RM 112.60 per day.

In favour of 2nd Plaintiff

Purchase price of property – RM 351,540

a) LAD from 1.11.1999 (last date for delivery of vacant possession) to 31.10.2002 (3years).

$$\text{RM } 351,540 \times 10\% \times 3 \text{ years} = \underline{\text{RM } 105,462}$$

b) LAD from 1.11.2002 to 4.9.2003 (date of writ)

= 9 months & 4 days

= 274 days.

$$\text{RM } 351,540 \times 10 \% \times \frac{274}{365}$$

$$= \underline{\text{RM } 26,389.58}$$

c) Total = (LAD from 1.11.1999 to 4.9.2003)

= RM 105,462+ RM 26,389.58

= RM 131,851.58

Thereafter LAD at RM 96.30 per day.

Costs for both Plaintiffs

Datin Zabariah Mohd Yusof

Tarikh 19.6.2009

Bagi pihak Plaintiff : Cheh Chooi Jing
(Tetuan Cheh & Co)

Bagi pihak Defendan : Shane Cheng
K. G. Goik
(Tetuan Jeff Leong, Poon & Wong)