

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S7-22-168-2007

BETWEEN

**1. PYL PROPERTIES SDN. BHD.
(No.Syarikat468158-D)**

2. LEE HOCK TEONG

.....PLAINTIFF

AND

**1. INLAND DELUXE SDN. BHD.
(No. Syarikat 584825)**

**2. TOH CHIN KOON
(No. K/P 650224-04-5449)
(disaman dalam kapasiti paribadinya dan juga
Sebagai pemunya tunggal Raintree Furniture,
Sebuah firma)**

**3. LEE SEE YANG
(No. K/P 700803-S-S433)**

....DEFENDANT

GROUNDS OF JUDGMENT

This is the Plaintiff's application for Summary Judgment against the Defendants under 0 14 RHC 1980. After reading through the written submissions filed by both parties, I allowed the application of the Plaintiff with costs. Below are my grounds.

Background Facts

The 1st Defendant had obtained tenancy of a piece of land in Subang Jaya from the registered owner. By an Agreement dated 8-11-2002 (the Agreement), the 1st Defendant appointed the 1st Plaintiff to construct a building on the said land for the 1st Defendant. The 1st Plaintiff is to be paid by the 1st Defendant a total of RM 1,000, 000.00. The balance construction sum was to be borne by the 1st Plaintiff who in turn obtained a sub-tenancy free of rent of part of the building known as the Food Court.

The 2nd Plaintiff is the director of the 1st Plaintiff.

The 2nd Defendant is the sole proprietor of Raintree Furniture.

The 2nd and 3rd Defendant are directors of the 1st Defendant.

The claim by the Plaintiff against the 2nd and 3rd Defendants is in respect of their guarantee given (in their capacity as directors of 1st Defendant) to the 1st Plaintiff that the 1st Defendant will pay amount due and owing to the 1st plaintiff under the Agreement.

PRELIMINARY OBJECTION BY THE FIRST DEFENDANT

The 1st Defendant raised the following preliminary objections:

- a) the 1st Plaintiff's claim herein against the 1st Defendant is in duplication of the 1st Plaintiff's claim against the 1st Defendant in Shah Alam High Court Civil Suit No. MT4-22-725-2005 ("the Shah Alam Suit")
- b) In Paragraph 3 of its Submissions, the Defendant contends that that some of the issues involved in this Suit are also involved in the Shah Alam Suit.
- c) That there are other claims by the Plaintiffs (as opposed to the 1st Plaintiff only) against the 2nd and 3rd Defendants as well.

THE COURTS FINDINGS ON THE PRELIMINARY OBJECTIONS RAISED BY THE FIRST DEFENDANT

The claim in this Suit is by the 1st Plaintiff against the 1st Defendant for:

- a. The outstanding contract sum of RM46,908.00 due on the Agreement;
(Paragraph 16 Statement of Claim)
- b. Interest thereon payable in consideration of the 1st Plaintiff agreeing to extend time to the 1st Defendant to settle the same.
(Paragraph 17 read together with Paragraph 15 and 15(a) of the Statement of Claim)

- b. A sum of RM 250,000.00 being advances made by the Plaintiffs to the 1st Defendant or at its request.
(Paragraph 19 Statement of Claim)
- c. Interest on part of the advances of RM150,000.00 amounting to RM209,250.00.
(Paragraph 20 read together with Paragraph 15 and 15 (b) of the Statement of Claim)
- d. a refund of RM15,500.00 being fines paid by the 1st Plaintiff due to the failure of the 1st Defendant to obtain Certificate of Fitness for Occupation to the constructed premises, which the 1st Plaintiff had tenanted from the 1st Defendant.
(Paragraph 22, Statement of Claim)

The other claims have nothing to do with the 1st Defendant (and hence the Shah Alam Suit). These claims are:

- a. By the 1st Plaintiff against the 2nd and 3rd Defendants in respect of their guarantee given (in their capacity as Directors of the 1st Defendant) to the 1st Plaintiff that the 1st Defendant will honour all payments due under the Agreement;
(Paragraphs 10 and 11 and 18, Statement of Claim)
- b. The Plaintiffs further claim against the 2nd Defendant a sum of RM 90,000.00 being monies advanced by them to a firm known as Raintree Furniture or alternatively as monies had and

received to the use of the Plaintiff. The 2nd Defendant is the sole proprietor of Raintree Furniture.

(Paragraphs 23 and 24 of the Statement of Claim.)

The Claim in the Shah Alam Suit is by the 1st Plaintiff against the 1st Defendant only for the losses and damage suffered by the 1st Plaintiff as a result of the 1st Defendant cutting off the electricity supply to the Food Court occupied by the 1st Plaintiff.

(Refer to Paragraph 6,15 to 11 of Statement of Claim at exhibit TCK-1)

I am of the view that the reliefs sought by the Plaintiff in these 2 suits are not the same. It is separate in respect of 2 separate causes of action. The filing of a separate suits is not illegal or wrongful. I find that there is no:

- element of successive action that can be interpreted to be a harassment on the Defendant;
- collateral attack on a previous decision and neither is there any previous determination, as the Shah Alam Suit has not been disposed yet;
- reassertion of a cause of action,
- evidence to show that the issues raised by the Plaintiff in this Suit could and should have been raised in an earlier proceedings.

For this I find support in the case of ***Bradford & Bingley Building Society v. Seddon*** (1999) AER 217, where the English Court of Appeal held that:

“Mere relitigation, in circumstances falling short of cause of action or issue estoppels, did not necessarily give rise to abuse of process. Similarly, the maintenance of a second claim which could have been a part of an earlier one or which conflicted with an earlier one, should not in itself be regarded an abuse of process, there must be some element additional to mere relitigation: for example a collateral attack in a previous decision, some dishonesty or successive actions amounting to unjust harassment. Election could be such an element, but only if it was of such a nature that the two claims were mutually exclusive or impossible in law, or of a formal or otherwise positive nature (for example, abandoning or releasing a party from an earlier action), or constituted a failure to pursue a pleaded claim in an earlier action.”.

There is however a common issue in the Suit herein and the Shah Alam Suit i.e. the issue of the Plaintiff failing to make payment towards the electricity supply to the Food Court.

The 1st Defendant submits that two different courts should not be determining on the same issues arising between the same parties relating to the same subject matter. This , according to the 1st defendant is premised in the passage of the judgment in the case of

Lesco Development Corp. Sdn. Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184.

If the Statement of Claim in the Suit herein is perused it is observed that the subject matter is in relation to the monies which is outstanding out of the construction works done by the 1st Plaintiff for the 1st Defendant. The 1st Defendant in turn claims the electricity charges as a set off against the amount as may be awarded to the 1st Plaintiff.

The subject matter of the Shah Alam Suit is with regards to the claim by the Plaintiff for the losses and damages incurred as a result of the 1st Defendant cutting off the electricity supply to the Food Court occupied by the 1st Plaintiff. The 1st Defendant raises the issue of non payment of the electricity supply as a counter claim in the Shah Alam Suit.

Thus, it is clear that the subject matter of the two Suits are different and hence, there is no question of duplicity of issues and certainly not an abuse of courts process. Therefore the preliminary objections by the 1st Defendant is dismissed.

THE COURTS FINDINGS ON THE 0 14 APPLICATION

The Defendant raised the issue of set-off to defeat the Plaintiff's application for Summary Judgment.

The set-off must essentially be connected with and form part of the matter upon which the Plaintiff's action is founded. It is essentially a defence to the Plaintiff's action. (Refer to ***Permodalan Plantations Sdn. Bhd. v Racuta Sdn. Bhd.*** [1985] 1 M.L.J.157.

I am of the view that the 1st Plaintiff's obligation to pay the electricity charges does not form part of the matter upon which the Plaintiff's action is founded and it is not a defence to the Plaintiff's claim.

Therefore the 1st Defendant cannot raise this issue relating to the electricity supply as a set off in this Suit. That issue can only be brought in the Shah Alam Suit where a counter-claim has been made.

The 1st Plaintiff is claiming the balance contract sum of RM 46,908.00 which sum was admitted to be due in a letter by the 1st Defendant dated 22-9-2004. This amount which was agreed and admitted to be due is not disputed by the 1st Defendant. The issuance of the cheque is not being relied on by the Plaintiff as proof of the liability of the 1st Defendant to the 1st Plaintiff. As such, the issue of stopping the cheque on the ground that the electricity charges were not paid is a non-issue.

In relation to the claim of the Plaintiff for the advances made to/on behalf of the 1st Defendant, the documents in exhibit PYL-2 in Enclosure 3A shows that payments have been made as follows:

- a) payment made on behalf of 1st Defendant
to Yuson Engineering Sdn Bhd.....RM 10, 000

 - b) payment made on behalf of 1st Defendant
to Raintree Furniture.....RM 90, 000

 - c) Friendly loans.....RM 150, 000
- Total : RM 250, 000

As far as the claim of RM 15, 500 which the Plaintiff claims to be the fines imposed due to failure of the Defendants to obtain a certificate of fitness for Occupation to the constructed premises, which the plaintiff had tenanted from the 1st defendant, the exhibits in PYL -2 shows that it is a notice of compound for failure to obtain licence for carrying out business in the food court. Therefore clause 3(v) and 19 of the Joint Venture Agreement is not applicable, as these 2 clauses states about the cost of applying for certificate of fitness for occupation is to be borne equally by both the 1st Plaintiff and the 1st Defendant. Thus the fines should be borne by the owners of the building i.e. the 1st Defendant.

Thus, for the above stated reasons, the preliminary objection and the oral application by the 1st Defendant in para 8 of its submission.(i.e. for the Plaintiff's claim herein be stayed until the disposal of the Shah Alam Suit or alternatively parties are at liberty to apply for a transfer of the action herein to Shah Alam High Court for the same to be heard together with the Suit herei), is hereby dismissed.

As for the application for Summary Judgment against the Defendants in the Suit herein, I order in terms of Enclosure 3 with costs as per the following terms in the Statement Of Claim:

Prayer 26 (a) and (b) allowed,

Prayer 26 (e) and (f) allowed,

Prayer 27 (a) and (d) allowed.

The Plaintiffs have not shown as to how they are entitled to general damages. Therefore there is no order as to general damages.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 29.5.2009

Bagi pihak Plaintiff : Tetuan A.J. Ariffin, Yeoh & Harpal

Bagi pihak Defendan : Encik B. Thangaraj
Tetuan Thangaraj & Associates