

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA

(BAHAGIAN DAGANG)

GUAMAN NO: D1-22-1837-2000

ANTARA

PERWIRA AFFIN BANK BHD

.... PLAINTIF

DAN

NEGARA PROPERTIES REALTY SDN BHD

(formerly known as Golden Hope Realty Sendirian Berhad DEFENDAN

GROUND OF DECISION

1. This suit was struck out by reason of want of prosecution there being inordinate and inexcusable delay. My reasons are as follows.

2. The Writ of Summons in this action was filed on 29.9.2000. After entering an Appearance, a Defence was filed on 30.11.2000. Under Order 34A Rules of the High Court 1980 which came into force on 21.9.2000, the Plaintiff was obliged to "cause to be issued from the Registry of the Court a notice in Form 63 requiring the parties to the action to attend before the Judge" 14 days after the close of pleadings. This was not done till 4.4.2003 [Encl 7]. The date for attendance was

fixed for 30.6.2003. On 22.4.2003, the Plaintiff also filed a Notice of Intention to Proceed issued under Order 3 Rule 6.

3. On 30.6.2003, the Plaintiff's solicitors withdrew Encl 7 with costs of RM250/= to the Defendant. Although the Plaintiff asked for liberty to file Form 63 again, none was filed. Despite the Notice of Intention to Proceed, the Plaintiff took no further action until the Court caused a Notice to Show Cause to be issued *vide* letter dated 13.5.2009 and parties were directed to attend court on 21.5.2009. On 20.5.2009, the Plaintiff filed another Notice of Intention to Proceed.

4. At the Show Cause hearing, learned counsel for the Plaintiff informed the court of internal problems within the firm of solicitors. It seems the previous solicitor handling the file relating to this action had left the firm some time last year. The Plaintiff was said to have also misplaced certain documents but had every intention of proceeding with the action as evidenced by the Notice filed.

5. Learned counsel for the Defendant took issue with the delay in prosecution and urged the court to strike the action out pursuant to Order 34 rule 2(2) RHC 1980 and the inherent jurisdiction of the court. Learned counsel for the Defendant argued there had been inordinate and inexcusable delay that had occasioned prejudice to the Defendant. Such prejudice was in the nature of a substantial risk of fair trial given the passage of time. The limitation period had also set in.

6. After hearing counsel and after considering the facts as adumbrated I struck out the action with costs.

7. There are several authorities over the years on the principles to be applied when determining whether to strike out an action for inordinate and inexcusable delay. Each has returned to the fundamentals which remain unwavering and this can be found in the Federal Court decision in ***Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152***. Though decided 27 years ago, it is sad to note that the observations made then still ring true today. The court dockets are filled with cases in various states of consciousness with some in the state of “deep coma” described by Salleh Abas FJ @ p 153 –

“Public interest therefore demands that the court should have the power to wake such sleeping cases and deal with them appropriately according to justice. This is the very reason why in 1976 a small departure was made in our procedural rules, from the English Supreme Court Practice whereby the High Court in this country is given power to issue notice to show cause to the plaintiff to explain why his action should not be dismissed for want of prosecution when he had taken no step to give notice of trial, notwithstanding the fact that the defendant makes no application and in such appropriate cases the court has the power to dismiss the case because of the plaintiff’s failure to give satisfactory response to such notice. This amendment however, does in no way affect the principle upon which the court will

determine the question whether or not to dismiss the plaintiff's action for want of prosecution. Such principle, we reiterate here, remains unchanged despite the amendment to the rules."

8. The Federal Court then proceeded to spell out the guiding principles when dismissing an action for want of prosecution-

"...when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant is prejudiced by it."

9. The reasons offered by the Plaintiff are not satisfactory. There was no explanation of what action had been taken by the Plaintiff or its solicitors since 30.6.2003 when the case came up for case management as the solicitor who handled the matter only left the firm last year. As for the Plaintiff misplacing certain documents, no details were offered by way of affidavit. The filing of the Notice of Intention to Proceed on just the day preceding the Show Cause hearing neither excuses the delay nor secures for the Plaintiff the automatic right to further conduct of the suit. Like the facts in ***Toh Hock Thye***, but for the court's notice to show cause, this action "*would still be in deep slumber and would not have come before the court...*". The period of over 5 years delay is long and without doubt it has brought adverse effect to the Defendant. If the period was taken from the date of commencement, it would have been even longer, a total period of almost 8 years 8 months. In such

circumstances, the delay inevitably brings prejudice. In **Toh Hock Thye** the Federal Court explained @ p 154 –

“The prejudice to him is not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or the lack of documents and the non-availability of witnesses but encompassing the psychological effect which the suit had on him for having it hung over his head for the last five years or so...”

10. The fact that the Plaintiff itself has difficulties with regards its own documents is clear illustration of what prejudice may be occasioned by inordinate delay. What more the Defendant that is left in this state of uncertainty. In **Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramajoo & Ors [1996] 2 MLJ 34**, Gopal Sri Ram JCA (as he then was) said @ p 44:

“In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action.”

11. With regard limitation period, the Court of Appeal had observed in **Trustees of Leong San Tang Khoo Khongsi v Lee Boon Tin [1998] 4 MLJ 373 @ 379**, that prejudice occasioned by inordinate delay “... is not confined only to adducing evidence in court but also to prejudice which a defendant would have suffered due to delay such as affecting

the limitation period, a fair trial not being possible, and business interests.”

12. Since I was not satisfied with the reasons given for the inordinate and inexcusable delay of over 8 years, I accordingly struck out the suit with costs.

Dated: 21st May 2009

(DATO' MARY LIM THIAM SUAN)
JUDICIAL COMMISSIONER
HIGH COURT KUALA LUMPUR
(COMMERCIAL DIVISION)

Solicitors:

Goh Siu Lin for the Plaintiff
Tetuan Shook Lin & Bok

R. Vatsala for the Defendant
Tetuan Zain & Co