DALAM MAHKAMAH TINGGI DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA

GUAMAN SIVIL NO.: BA-22NCvC-58-02/2021

ANTARA

SURESH KUMAR A/L RAMACHANDRAN
(No. K/P: 650505-08-5527) **– PLAINTIF**

DAN

EVERGREEN MORE SDN BHD
(No. Syarikat: 1243955-K) **– DEFENDAN**

GROUNDS OF JUDGMENT

Introduction

[1] This is a claim by the Plaintiff against the Defendant for RM4,600,000.00 consisting of an initial payment of RM 2,600,000.00 for the consultation and service as real property consultant agent and a further sum of RM2,000,000.00 arising from an undertaking given by Messrs Lio & Partners, the Defendant's solicitor, interest and costs.

[2] On 28-7-2022, after a full trial, I allowed the Plaintiff's claims, by reason of the Plaintiff has sufficiently prove its case on the balance of probabilities that the Plaintiff is entitled to receive his consultant fee. I have decided as follows:

(a) Defendan membayar kepada Plaintif RM2,600,000.00 baki yuran konsultansi.

(b) Defendan dan/atau peguam caranya Tetuan Lio & Partners menunaikan akujanji yang diberikan kepada Plaintif dengan melepaskan wang sebanyak RM2,000,000.00 kepada Plaintif.

(c) Faedah pada kadar 5% ke atas jumlah gantirugi di perenggan (a) dan (b) di atas dari tarikh penghakiman hingga penyelesaian penuh.

(d) Kos sebanyak RM15,000.00 (tertakluk kepada fi alokatur).

(e) Tuntutan balas ditolak dengan kos sebanyak RM5000.00 (tertakluk kepada fi alokatur).

[3] Unsatisfied with the decision, the Defendant filed an appeal. This judgment contains the reasons for my decision.

The agreed facts

[4] Parties had agreed only to the following facts:

(a) Defendan adalah sebuah syarikat yang ditubuhkan di bawah Akta Syarikat 1965.

(b) Defendan merupakan pembeli suatu hartanah daripada yang dikenali sebagai PF5635 (HSD 24027), Mukim Melaka Pindah dan Lot 2003 Mukim Galak, Daerah Alor Gajah Melaka daripada Yayasan Melaka.

(c) Pembelian hartanah tersebut telah disempurnakan dan Defendan adalah pemilik berdaftar.

(d) Defendan telah membayar RM2.4 juta kepada Plaintif.

The Seller, Purchaser & Lands

[5] The seller of the lands is Yayasan Melaka who had agreed to appoint the Plaintiff to find purchaser/buyer for the lands in Melaka.

[6] The Defendant had showed its interest in buying the lands and had agreed to use the Plaintiff's service as its consultant in order to ensure the Defendant can buy the lands.

[7] The price for the lands is set at RM136,972,690.92.

[8] The Defendant had agreed to pay the Plaintiff in the sum of RM5,000,000.00 for his services.

[9] Amongst the main terms in the sale and purchase process is that the Defendant must be able to settle the process of purchase in 6 months and another a month as the extension of time.

[10] The sale and purchase process must be settled with full payments on or before 28-6-2018.

[11] However the Defendant had failed to settle the purchase transaction before 28-6-2018. Then, the Defendant had asked the Plaintiff to apply for the extension of time from Yayasan Melaka in order that the Defendant can settle the sale and purchase.

[12] The Plaintiff's application for the extension of time is allowed by Lembaga Pengarah Negeri Melaka on 19-7-2018.

[13] As promised, the Defendant had fulfilled its payments to the Plaintiff in the sum RM2,400,000.00. Since the Plaintiff had completed its service to the Defendant, on 12-1-2021, the Plaintiff had demanded for the balance of payments from the Defendant.

[14] The Defendant declined to pay the balance to the Plaintiff because of these reasons –

(a) the Plaintiff had made a false representation that the Plaintiff is the representative of Yayasan Melaka (the owner of the lands).

(b) the Defendant made the part payment for the purchase of the lands caused by the false representation that the Plaintiff is the representative of Yayasan Melaka.

(c) Messrs Lio & Partners is not bound to release the sum of RM2,000,000.00 to the Plaintiff.

[15] The counter claim by the Defendant is that the Plaintiff must return the sum of RM2,400,000.00 to the Defendant and also for *ganti rugi teladan*, *ganti rugi teruk* and costs.

The issues to be tried

[16] The Plaintiff needs this Court to determine and decide on the following issues:

(a) whether the Plaintiff is entitled for the balance of the consultation fee?

(b) whether the Plaintiff is the consultant in the transaction of sale and purchase of the lands?

(c) whether the Defendant had appointed the Plaintiff as its consultant?

(d) whether the Plaintiff had made the false representation to the Defendant and/or Yayasan Melaka?

(e) whether the payment of RM2,400,000.00 made to the Plaintiff is caused by the false representation to the Defendant?

[17] The learned counsel for the Defendant submitted that these 2 questions are issues to be tried –

(a) Did the Defendant appoint the Plaintiff as their real property consultant agent and as a result was there consultant fees due to the Plaintiff?

(b) Is the Defendant bound by the undertaking given by its solicitors to pay the Plaintiff the sum of RM2,000,000.00 as it was a conditional undertaking?

The Trial & the Witnesses

[18] The full trial in this Court went on for 2 days (20th and 21st June 2022).

[19] The Plaintiff had called 2 witnesses, namely−

(i) Datuk Wira Zaini bin Md Nor (PW1), retired Pengurus Besar of Yayasan Melaka (the subpoena witness); and

(ii) Mr. Suresh Kumar A/L Ramachandran (PW2), the Plaintiff himself.

[20] The Defendant called 2 witnesses, namely−

(i) Dato Lio Chee Yeong, the lawyer/Defendant's solicitor (DW1); and

(ii) Mr. Teow Chee Chow, the Defendant's director.

The applicable law

[21] In the case of **TH Properties Sdn Bhd (No. Syarikat: 63904-D) & Anor v. Knight Frank Malaysia Sdn Bhd (No. Syarikat: 585479-A)**, Yang Arif Tuan Anand Ponnudurai, Judicial Commissioner High Court Kuala Lumpur had laid down significant principles of law.

[22] Yang Arif in his judgment held –

> "On the issue of the applicable law in cases such as these where the estate agent is claiming for commissions due, the law appears to be trite in that in order to be entitled to commission/agency fees, the agent must establish and demonstrate that it was the effective cause of the transaction. Reference is made to the Singapore cases of Colliers International (Singapore) Pte Ltd v. Senkee Logistics Pte Ltd [2007] 2 SLR® 230 which adopted the prima facie test of the *causa causans* for the sale as enunciated by CR Rajah JC in the case of **Grandhome Pte Ltd v. Ng Kok Eng [1996] 1 SLR (1) 14**.

The same principle of the agent needing to demonstrate that they were the effective cause of the transaction is applicable here as held by the Court of Appeal in the case of **Inch Kenneth Kajang Rubber Public Ltd Co v. Tor Peng Sie (tla Pacific Landsmark Real Estate Agents) [2014] 1 MLJ 118** which followed and adopted this *causa causans* approach as enunciated by the Federal Court in the case of **Chew Teng Cheong & Anor v. Pang Choon Kong [1981] 1 MLJ 298**.

There is also a recent decision of the Court of Appeal which facts are rather similar to the present. In the case of **Zerin Properties vs. Naza TTDI Sdn Bhd [2019] 5 MLJ 300**, the Plaintiff therein was a licensed real estate agency and claimed for fees due for services rendered in bringing about a joint venture between the Defendant and a third party to develop a plot of lands. The Plaintiff had arranged a meeting between the third party and the Defendant on 22nd July, 2014 to discuss the matter at which the third party confirmed its interest. Thereafter, nothing transpired further between the third party, the Plaintiff and the Defendant. About 17 months later, the Plaintiff (agent) discovered from media publications that the Defendant and the third party had formed a joint venture company to develop the said Lands. The Plaintiff then demanded for its fees for work done in making the joint venture happen. The Defendant denied that there was such an appointment nor that the agent was the effective cause. The agent failed in its claim in the High Court but in allowing its appeal, the Court of Appeal held that the agent was indeed the effective cause and that the company was merely trying to

circumvent paying the rightful agents fee especially when it was the Defendant who kept the Plaintiff out of negotiations. The Court of Appeal held as follows at paragraphs 37 to 39 of the Judgment:

> *[37] In Green v. Bartlett, G, an auctioneer and estate agent, was instructed by B to sell an islands by auction or otherwise. G put the islands up for auction but the reserved price was not reached. Afterwards, T, who had attended the auction, asked G for and was given B's name. T then approached B direct to negotiate the purchase of the islands. Before the eventual sale, B terminated G's authority to sell. The court held that G was the causa causans of the sale and was entitled to the commission.*
>
> *[38] In the present case, the defendant argued that the plaintiff was not the 'effective nor immediate cause of the transaction being brought about' as there were no further discussions from 22 July 2014 until January 2016, the plaintiff's appointment had expired on or before February 2015 which was before the development rights agreement dated 29 January 2016 entered between TTDI KL Metropolis and Golden Suncity Sdn Bhd and there was a break in the purported appointment.*

> *[39] With respect we find there are no merits in the defendant's submission. We adopt what we have stated in paras 25-30 and 34 and the sub-paras thereunder on the sequence of events that transpired prior to and post 22 July 2014 meeting and the plaintiff's involvement and the defendant's conduct throughout till 13 August 2014 and thereafter till 29 January 2016 of the fact that there was complete silence from the defendant. Applying the principle in Green v. Bartlett, we are of the view that the plaintiff is entitled to their fees notwithstanding the expiry of the period of the appointment under LOA2 and whether or not the subsequent discussions between Hap Seng and the defendant had stalled and had purportedly revived later, these do not constitute* a *break in the chain of causation. Further based on the preceding authorities cited, what is material is whether on the facts and evidence, the plaintiff was the effective cause of the transaction which we answer in the affirmative.*

In my view, the above decision of *Zerin Properties* demolishes the Appellant's contention that the fact that there was a lapse of time of 16 months from the time of the site visit by the Plaintiff and the ultimate sale would mean that the Plaintiff could not be the effective cause. In my view, notwithstanding that there was a lapse of time, it could still mean that the Plaintiff was the effective cause.

Additionally, in *Zerin's case*, the Court of Appeal went on to hold that if the Defendant alleges that there is another effective cause, the burden shifts to them to prove this (see: ***International Times & Ors v. Leong Ho Yuen*** **[1980] 2 MLJ 86**). In this regard, in the current case, whilst the Defendants has pleaded at paragraph 6(m) of their defence that JLL and/or HOC were merely contributory causes (not effective causes), for which they were not entitled to commission, the Defendant has failed to establish who then was the effective cause.

In my view, whether or not an agent was the effective cause of the sale, very much depends on the facts of each case. This is fortified by the decision of the Singapore Court of Appeal in the case of ***Goh Lay Khim and Others v. Isabel Redrup Agency Pte Ltd and another appeal*** **[2017] SGCA 11; 1 SLR 546** which had the occasion to deal with the definition of "effective cause" in a claim by an agent for fees where it held:

> ***'[37]*** *No precise definition of "effective cause" has been attempted in case law given that the inquiry is fact- specific. The decision of the High Court in* ***Grandhome Pte Ltd v. Ng Kok Eng [1996] 1 SLR(R)*** *14 ("Grandhome'J, however, offers some guidance as to what may constitute effective cause. At [31], the court held that:*

Where as in this case it is established that:

(a) *an owner agreed to pay an agent a commission for finding a buyer for a property; the agent engendered the interest of a buyer in the property;*

(b) *the buyer made an offer for the property which the agent conveyed to the owner;*

(c) *the owner eventually sells the property to the same buyer at the same price offered through the agent; and (e)(b) and (d) take place within* a *short space of time;*

the agent would have discharged the necessary burden of proof to establish a prima facie case for being the causa causans or effective cause of the sale. The owner can of course seek to show why despite all this the agent is not the effective cause. But if he fails to do so the agent will succeed.

It is apposite to note that the Grandhome factors only serve as a rough-and-ready guide in assessing an estate agent's contributions. A steadfast adherence to the Grandhome factors could in some cases lead to a wholly unjust outcome, as Lai Siu Chiu J noted in Colliers International (Singapore) Pte Ltd v. Senkee Logistics Pte Ltd [2007] 2 SLR(R) 230 at [76]. No one factor is determinative and the inquiry entails a holistic assessment of all the relevant facts of each case. It is insufficient for the agent to show that it was one of the

causes of the sale; it would have to show that it was the critical cause: Grandhome at [7].

On the facts of the case in *Goh Lay Kim* (*supra*), the Court of Appeal in concluding that the efforts of the agency had been the effective cause of the sale held as follows:

> *"[38] On the facts of the present case, we agree with the Judge that the Agency's efforts were the effective cause of the sale of the Properties to Aurum. First, Aurum's interest in the Properties was rekindled by Ms Prior's marketing efforts. Although Aurum had a pre-existing familiarity with the Properties, the fact is that Aurum was no longer in the picture at the time the Agency was appointed to market the Properties. Aurum had earlier decided to abandon its pursuit of the Properties, and its interest was only re-ignited by the Agency's advertisement in the newspaper. In other words, Ms Prior's marketing efforts led directly to Aurum's renewed attempt to purchase the Properties*.".

Evaluation & Findings of this Court

The Defendant has no defence and failed to rebut the material facts

[23] In order for the Plaintiff to claim for his consultation fees, the Plaintiff has the burden to prove that –

(a) the Plaintiff is the one who introduce Yayasan Melaka to the Defendant.

(b) the Plaintiff's roles in the sale transactions and it results that the lands were sold to the Defendant.

(c) the arrangements and dealings between the Plaintiff and Yayasan Melaka; and between the Plaintiff and the Defendant are sufficient and good to say that the Plaintiff has acted as a real consultant effectively in the sale transaction of the lands. The lands were sold to the Defendant and now the Defendant is the registered owner of the lands. The Plaintiff had done *effective cause of the transaction*.

[24] The evidences adduced by the Defendant are that the Plaintiff was not been appointed as a real property consultant agent by the Defendant. The reasons are that –

(a) as PW2, the Plaintiff insinuated that he was appointed by the Defendant to act on their behalf in the Sale and Purchase of two plots of lands from Yayasan Melaka. However upon challenge during cross exanimation the Plaintiff was unable to

substantiate his allegations with any extrinsic evidence.

(b) the Plaintiff admitted that he did not receive any appointment letter from the Defendant even though he has been a businessman and director of a Company for many years and is knowledgeable of company and business practices.

(c) the Plaintiff had contradicted in his evidence before this Court, where this clearly shows that the Plaintiff is unable to adduce any credible evidence of his alleged appointment by the Defendant or any payment received from the Defendant.

(f) the Plaintiff had also tried to shore up his claim by calling the retired Pengurus Besar of Yayasan Melaka who testified as PW1. However, in his testimony PW1, categorically stated that he had not dealt with Defendant and had solely dealt with the Plaintiff only.

(g) as one of the Defendant's directors, DW2, categorically denied that the Defendant had appointed the Plaintiff to act as a real property consultant agent. DW2's father named Teow Wooi Huat, has had frequent discussions with him and all decisions are made collectively.

(h) the Defendant's version is further strengthened by the various letters between Yayasan Melaka, and the Defendant and / or the Defendant solicitors which are exhibited in pages 1 to 14 of Bundle B (Enclosure 35) as agreed documents.

(i) the Defendant only admits to have dealt with the Plaintiff when he had held himself out as acting for Yayasan Melaka, a fact proven by PW1's testimony and promised to get the Defendant extension of time to pay the balance purchase price.

[25] Thus, the Defendant said that the Plaintiff has failed to prove his allegation that he was appointed as the real property consultant agent for the Defendant.

[26] The learned counsel for the Defendant cited the case of **Telekom Malaysia v KLK Electronics Sdn Bhd [2019] 4 MLJ 631**, where the Court of Appela held that it is trite that the legal burden of proof in civil case lies on the Plaintiff throughout the case and a failure to discharge the same will prove fatal to the claim.

[27] The evidence of the Plaintiff's subpoena witness that is Datuk Wira Zaini Md Nor, retired Pengurus Besar of Yayasan Melaka (PW1) had proved that the Plaintiff had done his works in introducing, dealing and did all the necessary transactions regarding the sale and purchase of the lands.

[28] PW1's testimony before me are produced as follows (notes of evidence from pages 6 to 8):

> "J: Yang Arif, boleh saya terangkan sedikit. Sebenarnya dalam urusan jualbeli ini saya sebagai Pengurus Besar telah dimandat oleh Lembaga Pengarah untuk menguruskan jualan ini dan apabila saya bertemu dengan Encik Suresh yang mempunyai pembeli yang

boleh membeli tanah sebanyak 513 ekar, dan saya telah bersetuju untuk berurusan dengan Encik Suresh. Jadi Encik Suresh telah mendapatkan semua surat-surat tunjuk minat daripada Evergreen More Sdn Bhd kepada saya dan saya bagi pihak Yayasan telah ditandatangani sehinggakan dari segi terma-terma harga tanah dan satu ketika di mana pihak Evergreen More telah gagal menjelaskan bayaran mengikut tempohnya dan begitu juga Encik Suresh telah mengemukakan semua rayuan-rayuan kepada Yayasan Melaka untuk mendapatkan kekurangan denda lewat dan sebagainya.

Untuk makluman Yang Arif, sebenarnya apabila saya telah diberi mandat untuk berurusan dengan Encik Suresh jadi semua urusan jualbeli ini termasuk rundingan dari segi rayuan dan surat menyurat semuanya diurus dan kami berurusan dengan Encik Suresh. Dan saya sebenarnya terus terang mengatakan saya tidak pernah berjumpa dengan pemilik Evergreen More Sdn Bhd semuanya diuruskan oleh Encik Suresh dan pihak kami dengan kata lain apabila Evergreen membayar semua bayaran ini menjadi tanggungjawab Yayasan untuk memindah milik tanah ini kepada Evergreen More Sdn Bhd.

Dan segi pengurangan, denda lewat dan sebagainya, itupun kami berurusan dengan Encik Suresh untuk berbincang dari segi pengurangan denda dan sebagainya dan kami mengurangkan denda lewat itupun setelah mendapat kelulusan dari pihak Lembaga Pengarah dan sebagainya dan keputusan itupun dimaklumkan kepada Encik Suresh. Itu kedudukannya sehingga akhir tanah ini dipindah milik.”.

[29] On the issue pertaining to late penalty imposed by Yayasan Melaka to the Defendant, PW1 said these −

> "J: Mengikut perjanjian asal denda lewat yang perlu dibayar iaitu 8% untuk dijelaskan denda lewat tersebut.
>
> J: Setelah berbincang dan argument serta pertimbangan-pertimbangan telah dibuat oleh Lembaga Pengarah kita telah mengurangkan kepada 2% bagi denda lewat tersebut.
>
> J: Secara ringkasnya surat ini saya sendiri yang mengeluarkan surat ini dan saya sendiri membuat pengakuan bahawa sepanjang tempoh bagi tujuan transaksi tanah ini saya berurusan dengan Encik Suresh Kumar a/l Ramachandran dan saya boleh tambah, dan saya memang tiada orang lain lagi saya berurusan bagi tujuan transaksi jualan ini.".

[30] The Plaintiff had received his consultation fee from Yayasan Melaka, PW1 said these –

> "J: Surat ini adalah surat daripada Yayasan Melaka bagi pihak Yayasan Melaka bagi menghargai atau bagi tujuan transaksi, pihak Yayasan Melaka telah bersetuju memberi saguhati kepada Encik Suresh dan ini telah dibawa ke dalam Mesyuarat Lembaga Pengarah dan bersetuju kerana atas usaha Encik Suresh untuk melaksana atau mendapatkan pembeli bagi tanah seluas 513 ekar. Jadi pihak kami telah bersetuju dan ianya telah dipersetujui oleh Lembaga Pengarah untuk menghargai usaha yang telah dilaksanakan oleh Encik Suresh.".

[31] This Court agree with the learned counsel for the Plaintiff that as an independent and subpoena witness, PW1 had no interest in this case for the Plaintiff and nothing against the Defendant.

[32] The learned counsel for the Plaintiff submitted "*Datuk Wira Zaini juga adalah saksi sapina, keterangan Datuk Wira Zaini juga adalah jelas bahawa plaintif mempunyai kebenaran dan kuasa dari Yayasan Melaka untuk mencari bakal pembeli untuk hartanah Yayasan Melaka. Hartanah tersebut adalah suatu transaksi khas disebabkan jumlah keluasan dan harga jualan yang tinggi. Hanya pembeli yang mampu boleh membuat pembelian sebegitu. Kejayaan plaintif mendapatkan pembeli amat dihargai oleh Yayasan Melaka dan Lembaga Pengarah bersetuju membayar kepada plaintif walaupun tiada kewajipan secara rasmi. Lembaga Pengarah juga melalui saksi sapina menyatakan transaksi tersebut diselamatkan oleh plaintif melalui penglibatannya dengan bukan sahaja mendapatkan lanjutan masa tetapi berjaya mengurangkan dengan lewat 8% kepada 2%. Setahun daripada baki harga jualan (RM118 juta [8% setahun adalah RM9,440,000.00 dan 2% setahun adalah RM2,360,000.00]).*".

[33] The Court finds that another main reason for the Defendant reluctant and/or refused and/or denied the balance of payments to the Plaintiff is because of the undertaking in the letter by the Defendant's solicitor. For this point, the Defendant strongly averred that the Defendant/Defendant's solicitor is not bound to pay the balance of payment to the Plaintiff.

[34] In DW1's testimony, as the solicitor for the Defendant, DW1 said that it is not disputed that there was a written undertaking given by the Defendant solicitor. However, the said written undertaking that is a letter from Messrs Lio & Partners clearly has a notation, *albeit* written, stating a condition that the sum of RM 2,000,000.00 will be paid to Plaintiff only after a 6-month extension of time to pay the Balance Purchase Price is granted by Yayasan Melaka <u>without any condition</u>. Due to the failure action taken by the Plaintiff pertaining to this written notation "without any condition", the Defendant was charged and/or been imposed by Yayasan Melaka with a penalty of 2% to be paid; that this is with a condition.

When Yayasan Melaka imposed 2% late payment penalty, it means that the Plaintiff had failed in discharging his duty as the consultant. Therefore, the Defendant's solicitor is effectively discharged from the undertaking.

[35] The learned counsel for the Defendant cited the case of **Siti Juriah Sahari & Yang Lain lwn. Citibank Bhd & Satu Lagi [2010] 1 CLJ 252** where Judicial Commissioner Kamardin Hashim (as his Lordship then was) stated as follows:

> *"[29] Apabila sesuatu akujanji itu diberikan secara bersyarat, maka syarat tersebut hendaklah terlebih dahulu dipatuhi dan disempurnakan sebelum akujanji itu ditunaikan. Akujanji ilu mestilah mengandungi syarat-syarat yang jelas dan tanpa berselindung.".*

[36] The learned counsel for the Defendant cited the case of **Simpang Maju Enterprises Sdn Bhd v Soh Yen Ling (Malayan Banking Berhad, third party) [2016] MLJU 605**, where this principle was further reiterated by His Lordship Justice Vazeer Alam Mydin Meera as follows:

> *"...Therefore, from the totallty of the evidence, I do not find that the Third Party was in breach of its duty of care to* make *prompt disbursement of the loan. Additionally, the Third Party's onus to pay the Plaintiff as per* the *Letter of Undertaking would only arise when the condition for payment stipulated in the Letter of Undertaking have been first fulfilled, for the undertaking is at best a conditional undertaking.".*

[37] On the issue of the Defendant's solicitor letter, the learned counsel for the Plaintiff in his cross-examination of DW1 (Lio Chee Yeong) had damaged the Defendant's defence. In the notes of evidence, they read –

> "Q: Can you explain to the Court why is that your official letter to Suresh Kumar was not dully amended or everything typewritten and just inserted handwritten. Why such a lacksadicle practice that has been employed here, can you explain?
>
> A: The "without any condition" right. You are referring to this one?
>
> Q: Yes. A: Because that upon of time, I think the letter was actually issued by my office, but it could actually be sent to the client's place. I could have been in a meeting at the client's place and they needed that letter immediately. So, I actually just print out from there then on the spot it was actually was found maybe send by email too, I do

not know how they actually sent to the client's place and they printed immediately. So, I was actually signed on this. So, this is my signature. Because normally this file was actually been handled normally people in the office then the staff was actually doing, my assistant lawyer actually do all this thing. So, they prepare the letter so, I just give them instruction "okay, you prepare this" that was actually quite an urgent thing, because that upon of time was actually the extension of time was actually very late already. So, if not we are suffering a big loss, so, we have to be very fast and then this Suresh, I don't know him, but client was saying that this guy can actually help us to do it so, they just want the RM2,000,000.00 commission. So, this is what we can do. Then, of course, we say that then when I actually give instruction to office to prepare the letter they sent it over then maybe when they sent over then of course, they did not as what I wanted. So, I was writing careful "without any condition" is that important term. So, that's why I have actually initiate do it immediately instead of re-printing and re-do the whole thing again.".

[38] This Court finds that this piece of evidence relied by the Defendant for refusing to pay the Plaintiff is not a cogent reason. The evidence of DW1 is not credible. The explanation about the terms "without condition" cannot deny the Plaintiff's right to have his full payment of the consultation fees. The case cited by the learned counsel for the Defendant should be differentiate from the fact in this case.

[39] The Plaintiff had done his duty to negotiate and dealt with Yayasan Melaka pertaining to the late payment by the Defendant. There is no letter by the Defendant nor the Defendant's solicitor to Yayasan Melaka asking for "an appeal" for not imposing any penalty against the Defendant.

[40] This Court agree with the learned counsel for the Plaintiff that the evidence of DW1 had expressly stated that the Defendant had given an instruction to the Plaintiff for an extension of time. For this "job", the Plaintiff is entitled for his service as consultant and/or middle man/person between the Defendant (as the purchaser) and Yayasan Melaka (as the seller). The evidence of DW1 and DW2 are consistent and blend well. Their evidences are faultless.

[41] The other issues raised by the Defendant that are –

- appointment letter by Yayasan Melaka and also appointment letter by the Defendant in order to "declare" the Plaintiff as the consultant.

- locus of Plaintiff to initiate this suit. During the course of the Trial, the Plaintiff disclosed that he was acting as a Director of a Company known as Etika Mewah Sdn Bhd.

- legality of Plaintiff's Claim, that the Plaintiff was appointed as a real property consultant agent since there is no evidence tendered to show that the Plaintiff and/or the Company Etika Mewah Sdn Bhd is a registered entity in compliance and with the Valuers, Appraisers, Estate Agents and Property Managers Act 1981.

- the contract between the Plaintiff and the Defendant is illegal. The learned counsel for the Defendant cited the decision of Federal Court's case in the Federal Court case of Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619.

[42] The above issues raised by the Defendant did not hold any water. Be that as it may, the Plaintiff is genuinely had "help" and rendered his services as the consultant and his "job" is completely done when the lands were registered under the Defendant's name. The Plaintiff had exercised his duty as the consultant and the lands were registered under the Defendant.

[43] The Defendant had paid partly to the Plaintiff for the services rendered by the Plaintiff but when it comes to payment the dispute plucked by the Defendant. For these 2 plots of lands, the Plaintiff had received "commission" and/or consultant fees from Yayasan Melaka and for the Defendant, the Defendant must pay the balance of the payment that due to the Plaintiff.

[44] The defence and the counter claim by the Defendant are just bare denial and no merits.

[45] This Court cannot agree with the Defendant that the Plaintiff had made false representation to the Defendant regarding the issue on representative of Yayasan Melaka. PW1 had identified the Plaintiff as the only person who dealt with Yayasan Melaka. PW1 also had submitted the relevant documents for Yayasan Melaka to pay the Plaintiff for his consultation fees is as a matter of appreciation. The Plaintiff had

successfully sold the lands to the Defendant.

[46] The appointment document in appointing the Plaintiff as the consultant must come from the Defendant and here, the Defendant had failed to explain to this Court the reasons that the Defendant did not supply the relevant document (that is the letter of appointment) to the Plaintiff.

[47] From the above evidences, it is very clear about the role played and actions taken by the Plaintiff. This Court agree with the Plaintiff that the arrangements and dealings between the Plaintiff and the Defendant are sufficient and good to say that the Plaintiff has acted as a real estate agent and consultant effectively in the sale transaction of the lands.

[48] During the arrangements, dealings, communications and meetings with the Defendant, no issue pertaining to the estate agency fees, no issue raised about the consultant fees between the Plaintiff and Defendant. Therefore, this Court cannot agree with the Defendant that there was no contract between the Plaintiff and Defendant, and also this Court is totally disagree there the contract between the Plaintiff and Defendant is illegal.

[49] There is a valid and binding agency contract between the Plaintiff and Defendant.

[50] Based on the documents produced and tendered before me, the failure on the Defendant to quash all the material facts submitted by the Plaintiff constitute a serious defect to the Defendant's case. The Plaintiff has successfully formulated and rely on the material facts to prove his claim for the commission or fee or agency fee against the Defendant.

[51] In the case of **Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd [2016] 7 CLJ 679**, Hamid Sultan JCA, the Court of Appeal held –

> "[4] *It is well established that it is not the function of the court to build a case for the plaintiff/defendant inconsistent with the pleaded case. In Yew Wan Leong v. Lai Kok Chye [1990] 2 MLJ 152, the Supreme Court had in strong terms held, and which still stands as a 'gold standard' in pleading rules and evidence, as follows: It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance…*".

[52] The Plaintiff has a burden of proof and must produce and effect its evidence before this Court. The Plaintiff's witnesses that are PW1 and PW2 has fulfilled the provisions in Evidence Act 1950 (*Act 56*) −

"**PART III**

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII

BURDEN OF PROOF

Burden of proof

101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

On whom burden of proof lies

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.".

[53] The Defendant has the obligations in law to clarify on the facts regarding the non-appointment of the Plaintiff as the real estate agent or non-execution of that appointment to the Plaintiff. This is provided in **section 106 Evidence Act 1950** −

"106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.".

[54] In the case of **Berjaya Development Sdn Bhd v. Keretaapi Tanah Melayu Berhad [2012] 4 CLJ 35**, it was held −

> *"[7] The burden of proving a claim lies on the person alleging the claim. So it is here, the burden is on the Plaintiff to prove his claim before the burden moves to the defendant. Section 101 Evidence Act 1950 refers …".*

[55] In the present case, the Plaintiff has showed to this Court that the steps taken and the efforts has been done in order to sell the landss to the Defendant. The appointment as an agent is never been made by the Defendant. So, it is the duty for the Defendant to explain to this Court the reasons for the non-appointment of the Plaintiff.

[56] As regards to act and communications between the parties, I would like to quote **Chitty's on Contract** as follows:

> "*Agreement is not a mental state, but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what in their minds but by what they have said or written or done.*".

[57] I agree that the Plaintiff has at all material times has fulfilled and discharged its burden to proof that there exists a valid contract between the Plaintiff and the Defendants for the commission or fee or agency fee or professional fee.

[58] The Defendant's witnesses cannot help the Defendant's case and to rebut the Plaintiff's case. For this, I respectfully agree with the Plaintiff that the Plaintiff has been the effective cause of the sale transaction. The balance of payment must be released to the Plaintiff as his consultant fees.

CONCLUSION

[59] In view of the foregoing, it is my judgment that having evaluated the evidence adduced at trial, I find the Plaintiff has successfully establish its claim on the balance of probabilities that the Plaintiff is entitled to its consultant fee or commission or fee or agency fee or professional fee. The Defendant has no defence and failed to rebut the material facts.

[60] As such, I allowed the Plaintiff's claim with costs (subject to the allocator fee). The counter claim is dismissed with costs.

[61] My decision is as follows:

> *Oleh yang demikian, saya membenarkan tuntutan Plaintif dan selanjutnya adalah dihakimi bahawa –*
>
> *(a) Defendan membayar kepada Plaintif RM2,600,000.00 baki yuran konsultansi.*
>
> *(b) Defendan dan/atau peguam caranya Tetuan Lio & Partners menunaikan akujanji yang diberikan kepada Plaintif dengan melepaskan wang sebanyak RM2,000,000.00 kepada Plaintif.*

(c) *Faedah pada kadar 5% ke atas jumlah gantirugi di perenggan (a) dan (b) di atas dari tarikh penghakiman hingga penyelesaian penuh.*

(d) *Kos sebanyak RM15,000.00 (tertakluk kepada fi alokatur).*

(e) *Tuntutan balas ditolak dengan kos sebanyak RM5000.00 (tertakluk kepada fi alokatur).*

Dated: 4 September 2022

RoziBainon

(ROZI BINTI BAINON)
Judicial Commissioner
High Court NCvC12
Shah Alam

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