DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
RAYUAN SIVIL NO: WA-12ANCvC-380-12/2021

Antara

Prudential Properties Sdn Bhd
(No. Syarikat: 22310-H) ... Perayu

Dan

Pauson Corporation Sdn Bhd
(No. Syarikat:42060-X) ... Responden

[Dalam Mahkamah Sesyen Di Kuala Lumpur
Dalam Wilayah Persekutuan, Malaysia
Guaman Sivil No. WA-A52NCvC-814-09/2018

Antara

Pauson Corporation Sdn Bhd
(No. Syarikat:42060-X) ... Plaintif

Dan

Prudential Properties Sdn Bhd
(No. Syarikat: 22310-H) ... Defendan

JUDGMENT

Introduction

[1] This is an appeal against the decision of the Sessions Court at Kuala Lumpur allowing an application by Pauson Corporation Sdn Bhd ("Pauson") under O. 14A of the Rules of Court 2012. Pauson had *vide* Civil Suit No. A52NCvC-814-09/2018 ("Civil Suit 814 of 2018") sought declarations of its legal rights, namely, that it is the beneficial owner of Lot 6.18, 6th Floor, Imbi Plaza ("the property") and does not owe Prudential Properties Sdn Bhd, the defendant ("Prudential"), as developer, any monies in the form of outstanding service charges. Pauson also sought a consequential order that Prudential executes a memorandum of transfer of the property in its favour.

[2] Prudential filed a defence stating that it had a contractual right not to execute the memorandum of transfer until Pauson has paid the said outstanding charges with interest and pleaded that the Pauson's action was *res judicata*. Prudential also filed a counterclaim for RM324,203.88 with late payment interest as at 29.2.2007 for the unpaid charges which are for the period beginning 1.7.1998 until 31.12.2007.

[3] It suffices to say that Prudential's application to strike out the civil suit on the ground of *res judicata* did not succeed. The Court of Appeal had on 9.1.2020 reversed the striking out order made by the Sessions Court which order was upheld by the High Court on appeal. The Court of Appeal remitted the civil suit back to the Sessions Court for trial. Subsequently, on 29.7.2021, Pauson filed the O. 14A application. The learned Sessions Court Judge had maintained and answered the questions of law and construction of the sale and purchase agreement as framed by Pauson over the questions framed by Prudential.

[4] Prudential, aggrieved with the decision of the learned Sessions Court Judge appealed to this Court. On 28.6.2022, I dismissed the appeal. The reasons for my decision are as follows.

The facts

[5] The facts are not in dispute and are as follows. Prudential is the developer of Imbi Plaza. It had on 15.10.1981 executed a sale and purchase agreement of the property with DP Consultants Service Pte Ltd ("the Principal Agreement"). On

20.11.1981 *vide* a sale and purchase agreement the Liquidator for DP Consultants Service Pte Ltd sold the property to Pauson ("the 2nd Agreement"). Pauson had paid the Liquidator the full purchase price of the property as provided under the 2nd Agreement.

[6] On 11.1.1982, Pauson and the said Liquidator entered into a deed of assignment wherein Pauson had agreed to accept all whatsoever rights, title and interest in and to the property on the terms and subject to conditions therein which included to pay all monies hereafter payable to Prudential pursuant to or under or by virtue of the Principal Agreement. Prudential had consented to and confirmed receipt of the said deed of assignment.

[7] On 8.1.1997, Prudential assigned its rights to collect service charges pursuant to section 4.01(b) of the individual sale and purchase agreements entered with purchasers who had purchased individual lots in Imbi Plaza to Imbi Plaza Management Services Sdn Bhd. The collection included other rates, and charges including arrears thereof together with the right to so far as necessary to demand performance or sue for and enforce the same. In this aspect the deed of assignment

states and places Imbi Plaza Management Services Sdn Bhd in the place of Prudential in each of the sale and purchase agreements.

[8] On 11.2.2008, Pauson, sent a memorandum of transfer for the property to be transferred to its name after the subsidiary titles were issued for the building. Prudential refused to execute the same until Pauson pays the outstanding service charges according to the terms of the Principal Agreement. On 27.8.2014 Pauson commenced Civil Suit No. A52NCvC-420-08/2014 at the Kuala Lumpur Sessions Court ("Civil Suit 420 of 2014") for an order compelling Prudential to execute the memorandum of transfer. Prudential's defence was that it had a contractual right based on the Principal Agreement not to execute the memorandum of transfer until Pauson has paid the said outstanding charges. Prudential also counterclaimed for the sum of RM324,203.88 being the outstanding charges with interest accrued as at 19.2.2014. The counterclaim was based on Imbi Plaza Management Services Sdn Bhd statement of account. Pauson filed a reply disputing the propriety of the outstanding charges and more importantly that the outstanding charges

claimed in the counterclaim were barred by the Limitation Act 1953.

[9] After a full trial the Sessions Court Judge, on 19.7.2016, allowed Pauson's claim and dismissed Prudential's counterclaim on the ground that the outstanding charges were barred under the Limitation Act 1953. Prudential appealed to the High Court *vide* Civil Appeal No. WA-12BNCvC-130-08/2016. On 8.9.2017, the High Court dismissed the appeal and upheld the dismissal of the counterclaim on the limitation ground. Prudential appealed to the Court of Appeal *vide* Civil Appeal W-04(NCvC)(W)-432-10/2017. On 17.4.2018, the Court of Appeal held as follows:

(a) the order for Prudential to execute the memorandum of transfer is set-aside;

(b) the order of the Sessions Court dismissing the counterclaim for outstanding service charges is upheld; and

(c) the costs awarded in the Sessions Court and the High Court are set aside and no order of costs was made at the Court of Appeal.

[10] So, clearly, the outstanding charges were held to be barred by limitation and were lost to Prudential forever. On 3.9.2018, Pauson commenced Civil Suit 814 of 2018 for the declarations of its rights stated in paragraph [1] above. Also, as shown above, Prudential's defence was that under the Principal Agreement read with the deed of assignment dated 11.1.1982 it had a right not to execute the memorandum of transfer until Pauson settles its outstanding charges. When the Court of Appeal remitted the civil suit back to the Sessions Court for trial Pauson filed the O. 14A application (the subject matter of this appeal).

Deliberations and decision

[11] O. 14A enables the court to "determine any question of law or construction of any document" where it appears to the court that "such question is suitable for determination without the full trial of the action" and "such determination will finally

determine the entire cause or matter or any claim or issue therein". I found and am in agreement that the civil suit before the Sessions Court was an appropriate case to be determined under O. 14A. The facts are not in dispute and as such no *viva voce* evidence is required. The questions determined by the Sessions Court are questions of law and construction of the agreement, in particular, the Principal Agreement. The questions determined by the learned Sessions Court Judge would dispose of the entire action and the counterclaim.

[12] Prudential's first complaint is that the learned Sessions Court Judge failed to comply with O. 14A r. 1(3) which states, "the Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question". In other words, Prudential claimed that it was deprived of the right to be heard without a two-stage process being conducted. The first stage to frame the questions and the second stage to determine the questions. I found the complaint frivolous and vexatious. Every case would depend on its own facts. The questions framed by Pauson were in the application and affidavit in support that were served onto Prudential which had in general agreed that the civil suit could be disposed without a trial and in

particular agreed that the answers to questions 4(a), (b), (c) and (f) framed by Pauson would determine the issues raised therein. These questions would take care of a substantial part of the civil action leaving only the question whether the outstanding charges were no longer claimable by virtue of res judicata.

[13] I found that Prudential apart from suggesting that some questions be paraphrased also put forth questions of its own. The learned Sessions Court Judge maintained Pauson's questions. I have looked at the questions framed by Prudential and found no real difference apart from arrangement and words used. Thus, the right to be heard is sufficiently met with affidavits. In any event, an oral hearing is not necessary as the right to be heard is also valid by way of written representations such as affidavits (see Privy Council decision in **Najar Singh v. Government of Malaysia & Anor** [1976] 1 MLJ 203). In the circumstances, I found no reason to disturb the decision of the learned Sessions Court Judge in maintaining the questions by Pauson which would dispose of the entire civil suit.

The questions and answers

[14] The questions accepted by the learned Sessions Court Judge framed by Pauson and answered by the learned Sessions court Judge are as follows:

[15] Question (a): whether Pauson is the beneficial owner of the property? This question was answered in the affirmative as it is an undisputed fact that Pauson had paid the full purchase price under the 2nd Agreement. As such, Prudential is merely a bare trustee.

[16] Question (b): whether the execution of the letter of indemnity is a pre-condition for the execution of the memorandum of transfer of the property to Pauson? This question was answered in the negative as nowhere in the Principal Agreement or the 2nd Agreement is there such a requirement.

[17] Question (c): whether Pauson has an obligation to pay all the charges before the execution of the memorandum of transfer for the property under section 5.04 of the Principal Agreement with the heading "Transfer of Title to Purchaser" which provides as follows:

> Provided that the Purchaser shall have paid to the Company the full purchase price and all other monies (if any) payable hereunder and shall have duly observed and performed the various terms, conditions and stipulations herein to be observed and performed by him the Company shall upon such payments thereof as aforesaid or at the date of the issue of the relevant separate subsidiary title (whichever shall be the later) execute a valid and registrable transfer of the same in favour of the Purchaser or the Purchaser's permitted nominee(s).

[18] The question was answered was in the negative.

[19] Question (d): based on section 4.01(a), (b) and (c) and section 5.04 of the Principal Agreement whether Pauson is required to pay all the alleged outstanding sums claimed by Prudential? The section 4.01 of the Principal Agreement states as follows:

> (a) From the date of this Agreement and until the issue of a subsidiary title to the said Premises and transfer thereof to the Purchaser and formation of the Management Corporation under the provisions of the National Land Code, 1965 (hereinafter referred to as the Management Corporation") and upon the Company having duly transferred to all the respective purchasers of all the other units of business premises comprised in Imbi Plaza the Purchaser shall duly and punctually pay to the Company whether formally demanded or not all outgoings including quit rent rates assessments and insurance against fire and other risks in respect of the said Premises which sum shall be calculated in the following manner: - ... The aforesaid sum referred to in this Section shall be paid by the Purchaser within fourteen (14) days from the

date of a notice from the Company requesting for such payment and if the Purchaser shall fail, neglect and/or refuse to pay such sum within the time stipulated the Purchaser shall pay to the Company interest on such unpaid sum at the rate of twelve per centum (12%) per annum calculated from day to day provided always nothing herein contained shall prejudice the rights of the Company under Section 7.01 hereof. For the purposes of payment of all sums under this Section time shall be of the essence of the contract.

(b) From the date the Purchaser is entitled to possession of the said Premises the Purchaser shall pay quarterly in advance to the Company Service Charges in respect of the said Premises whether formally demanded or not in the sum calculated on the basis of forty-five cents (45¢) per square foot of the area of the said Premises provided always that the Company reserves the right from time to time to vary such rate by notice in writing to the Purchaser and such payment shall be made by the Purchaser

to the Company within fourteen (14) days from the date of the notice from the Company requesting such payment and if the Purchaser shall fail, neglect and/or refuse to pay such sum within the time stipulated the Purchaser shall pay to the Company interest on such unpaid sum at the rate of twelve per centum (12%) per annum calculated from day to day until the date of settlement.

(c) From the date when the Purchaser is entitled to possession and in addition to the Service Charges payable aforesaid the Purchaser hereby agrees to contribute a fair and rateable portion of the cost and expense for the maintenance, repair and replacement of the roof, main structure and all the common property of Imbi Plaza which shall include the exterior and interior parts of Imbi Plaza the drains culverts, sewerages, septic tanks, water tanks, cables, pipes, electric supply line and all other items for the supply of the amenities aforesaid.

[20] The question was answered was in the negative. Thus, the sub question was not and need not be answered.

[21] Question (e): whether Prudential is the proper party who is entitled to claim a sum of RM384,666.00 for outstanding amount for the service charges, service tax, air conditioning chiller with interests. The question was answered in the negative. Thus, the sub questions were not and need not be answered. Apparently, the reasoning was due to the fact that Prudential had assigned its rights to collect the service charges to Imbi Plaza management Services Sdn Bhd it is the latter who should be sued and not the former.

[22] Question (f): whether Prudential's claim is barred by section 6(1) and/or section 32 of the Limitation Act 1953? This question was answered in the affirmative.

[23] Question (g): whether the alleged outstanding sum is barred by the doctrine of *res judicata* by way of the Court of Appeal order dated 17.4.2018? This question was answered in the affirmative. The Court of Appeal had upheld the decision of the Sessions Court which held that time began to run from

31.12.2007 based on the statement of accounts prepared by Imbi Plaza Management Services Sdn Bhd. The Court of Appeal had therefore affirmed that the outstanding charges were properly due to Prudential since the court clearly dismissed Prudential's counterclaim for the same by virtue of section 6 of the Limitation Act 1953.

Decision

[24] In my mind the Questions (a), (b) and (g) were correctly answered in the affirmative. There is no doubt that in law Pauson is the beneficial owner of the property having paid the full purchase price under the 2nd agreement. Clearly also there is no obligation anywhere on Pauson in the Principal Agreement, 2nd Agreement or the deed of assignment to sign any letter of indemnity in favour of Prudential.

[25] I am in full agreement with the answer to Question (g) in that the outstanding charges made pursuant to Imbi Plaza Management Services Sdn Bhd statement of accounts and counterclaimed by Prudential is caught by *res judicata* by virtue of the decision of the Court of Appeal in Civil Suit 420 of 2014.

The Court of Appeal had affirmed that the outstanding charges were properly due to Prudential but by virtue of section 6 of the Limitation Act 1953 were time barred and denied it to claim the same. The decision is therefore binding on Prudential and its privies which include Imbi Plaza Management Services Sdn Bhd who was assigned to collect the charges on behalf of Prudential vide the deed of assignment dated 8.1.1997.

[26] The defence of Prudential alleging that it has a right not to execute the memorandum of transfer in favour of Pauson for the failure to pay the outstanding service charges and making a counterclaim for the payment of the same amount is in my judgment a blatant abuse of the process of the court. The outstanding charges had been fully adjudicated to finality in Civil Suit 420 of 2014. Issue estoppel applies as the issue of limitation was fully ventilated and determined. In the circumstances the finality of the issue is not to be reopened or relitigated.

[27] Independent from the reason in the preceding paragraph, another reason why reliance on section 105(2) of the Strata Management Act 2013 (which only came into operation on 1.6.2015 *vide* PU(B) 237/2015) cannot apply is because at the

material time the defence of limitation under section 6 of the Limitation Act 1953 was available to Pauson and Pauson cannot be deprived of this right. In this regard the often-quoted statement by Lord Brightman in the Privy Council case of **Yew Bon Tew & Anor v. Kenderaan Bas Mara** [1983] 1 MLJ 1 is instructive:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. ... When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

> In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a " right " as any other statutory or contractual protection against a future suit.

[28] The principle in **Yew Bon Tew**, *supra* was quoted with approval and applied in a host of cases which includes **Tenaga Nasional Bhd v. Kamarstone Sdn Bhd** [2014] 1 CLJ 207 where the Federal Court reiterated:

> Still, we could take this opportunity to uphold that it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute.

[29] Now, I am aware of the **Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation** [2019] 2 CLJ 592 where the Court of Appeal held that where there is a running account then the outstanding charges are not caught by section 6 of the

Limitation Act 1953. However, unlike **Ekuiti Setegap Sdn Bhd**, which I would be bound to apply if the facts were the same, the facts in the instant appeal are different. In **Ekuiti Setegap Sdn Bhd**, the court was deciding limitation being heard for the first time in a running account situation.

[30] This appeal is distinguishable given that there was already a final and binding decision made on the outstanding charges in Civil Suit 420 of 2014. The doctrine of *res judicata* or issue estoppel concerning the issue limitation applied in the situation before me. With *res judicata* the issue of limitation that was decided at that point in time cannot be relitigated again as though it did not exist. In this regard the principle stated in **Ekuiti Setegap Sdn Bhd** does not appy.

[31] Secondly, the statement of accounts relied on is not a running account. It is merely begins from 1.7.1998 and stops at 31.12.2007 and is Imbi Plaza Management Services Sdn Bhd's statement of account. But according to contemporaneous evidence in the form of a letter dated 18.6.2008 the management of Imbi Plaza was taken over by a joint managing board known as Badan Pengurusan Imbi Plaza. In the said letter the secretary

of the board stated that at an extraordinary general meeting of the joint management board held on 23.5.2008 it was resolved that the board will take over the management and maintenance of Imbi Plaza. It was also said, "However, as you are aware, we are taking over management with zero financial position" and asked for the support to make prompt and regular payments so that the board could carry out its duties. Thereafter, Imbi Plaza Management Corporation took over from Badan Pengurusan Imbi Plaza. If there was a running account it would be that of either of the latter two bodies. But that was not the case. In absence of a running account the principle in **Ekuiti Setegap Sdn Bhd** does not appy. In the circumstances, the issue of limitation cannot be reopened and relitigated. Such an action would be an abuse of the process of the court.

[32] In my view, in respect of Questions (d), I find that on the interpretation of section 4.01(a) and (b) and section 5.04 of the Principal Agreement read with the deed of assignment dated 11.1.1982 that Pauson owes the outstanding charges to Prudential. However, on the latter part of the question, namely, whether Pauson is required to pay all the alleged outstanding sums claimed by Prudential must be answered in the negative by

virtue of the decision of the Court of Appeal in Civil Suit 420 of 2014. Pauson need not pay the said outstanding sum as limitation has been adjudicated to defeat Prudential's counterclaim as the doctrine of *res judicata* comes into play.

[33] Prudential sought to apply the principle in **Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors** [2006] 1 CLJ 41 which was that the doctrine of *res judicata*, whether in its narrow or broader sense, is designed to achieve justice and the court may decline to apply it where to do so would lead to an unjust result. I find that on the facts the principle has no application. It is a poor attempt to have a second bite of the cherry so to speak. The decision in Civil Suit 420 of 2014 clearly binds Prudential and has become the truth between the parties. It would be against public policy, and oppressive to Pauson to re-agitate the dispute that has been determined to its conclusion after exhausting the appeal process.

[34] I am mindful that the matter is before me by way of rehearing and also of the principle on which an appellate court could interfere with the decision of the court below is 'the plainly wrong test' principle. Further on review of discretion the appellate

court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (**Vasudevan v. T Damodaran & Anor** [1981] 2 MLJ 150; and **Evans v. Bartlam** [1937] AC 473).

[35] I am satisfied that the Questions (a), (b), (d) and (g) would be sufficient to dispose of this appeal. For the reasons stated above I find no reason to interfere with the ultimate decision arrived at. I am satisfied that no court, properly instructing itself in the law and faced with the undisputed facts in the instant appeal could have come to any other conclusion from the conclusion which in fact was arrived at.

Conclusion

[36] For the above reasons Pauson is entitled to the declarations and the consequential that were granted by the learned sessions Court Judge. The counterclaim by Prudential was rightly dismissed. In the circumstances the orders made by

the learned Sessions Court Judge are upheld and the appeal is accordingly hereby dismissed.

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Amarjeet Singh Serjit Singh
Judge
High Court Kuala Lumpur

Dated 13th October 2022

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Casses referred to:

1. **Najar Singh v. Government of Malaysia & Anor** [1976] 1 MLJ 203

2. **Yew Bon Tew & Anor v. Kenderaan Bas Mara** [1983] 1 MLJ 1

3. **Tenaga Nasional Bhd v. Kamarstone Sdn Bhd** [2014] 1 CLJ 207

4. **Ekuiti Setegap Sdn Bhd v. Plaza 393 Management Corporation** [2019] 2 CLJ 592

5. **Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors** [2006] 1 CLJ 41

6. **Vasudevan v. T Damodaran & Anor** [1981] 2 MLJ 150

7. **Evans v. Bartlam** [1937] AC 473