

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM**  
**DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA**  
**(BAHAGIAN SIVIL)**

**GUAMAN NO.: BA-22NCvC-187-05/2021**

**ANTARA**

**LADANG VENU (M) SDN. BHD.**  
**(No. Syarikat: 915085-D)**

**– PLAINTIFF**

**DAN**

**D PRISTINE MEDINI SDN. BHD.**  
**(NO. SYARIKAT: 984932-H)**

**– DEFENDANT**

**GROUND OF JUDGMENT**

***Introduction***

[1] The Defendant's application to strike out the Plaintiff suit is filed on 3-11-2021 (**Enclosure 9**) pursuant to Order 18, rule 19 (1)(b) and/or (d) Rules of Court 2012 [*P.U(A) 205/2012*] against the Plaintiff and also for the following orders:

- (a) *Writ Saman dan Pernyataan Tuntutan Plaintiff bertarikh 1.5.2021 diketepikan dan dibatalkan tanpa kebebasan untuk memfailkan semula;*



S/N 7EXzDWPVDUuOQ1oEHkDqg

\*\*Note : Serial number will be used to verify the originality of this document via eFILING portal

- (b) *Kos permohonan ini dan tindakan ini dibayar oleh Plaintiff kepada Defendan; dan*
- (c) *Apa-apa arahan dan/atau perintah lain atau selanjutnya diberikan atau dibuat yang difikirkan patut atau suaimanfaat oleh Mahkamah*

[2] The grounds for this application are *inter alia* as follows:

- (a) the Defendant had delivered the vacant possession in accordance with the terms in the Sale and Purchase Agreement. Therefore, the action against the Defendant is clearly *suatu tindakan yang meremehkan dan menyusahkan dan adalah wajar dibatalkan memandangkan tidak pernah ada sebarang kemungkiran kontrak oleh Defendan.*
- (b) the vacant possession is successfully delivered to the Plaintiff on 22-1-2019 and 4-3-2019
- (c) the Sale and Purchase Agreement must be read fully and together with the Preamble. The Sale and Purchase Agreement should not be read disjunctively.
- (d) by reading holistically of the Agreement, it is clearly disclosed that the issuance of Certificate of Completion and Compliance (CCC) is in accordance with clausa 26(3) of the Agreement.



- (e) it's a wrong interpretation by the Plaintiff by saying that the words "the Building" in klausa 26(3) referred to the whole project. In facts, it is the actual term in the Agreement.
- (f) the Defendant had fulfilled its obligations as agreed by the parties under the Agreement.
- (g) there are no issues in facts and laws that need a full trial by way of witnesses' evidence.
- (h) there is no merit in the Plaintiff's claims and this action can be dismissed pursuant to Order 18 rule 19 (1)(b) and/or (d) Rules of Court 2012.

***What are the Plaintiff's claims?***

[3] The Plaintiff objected and opposed to the application of striking out.

[4] The overview of the case as per the Plaintiff's version is as follows:

- (a) at all material times, the Defendant represented to the Plaintiff that the Defendant will be constructing a mixed-used commercial development known as d'PRISTINE @ MEDINI based on the approval of the Building Plans from the relevant authorities.
- (b) on 26-6-2014, the Plaintiff and the Defendant signed a Sale and Purchase Agreement for the unit known as T2-18-07 ("the T2-18-07 SPA") wherein the Plaintiff agreed to sell and the Defendant agreed to purchase a parcel known as No. Parcel



07, Type SOFO Premium Suite B (Intermediate Lot), Floor 18, Building No. T2, Area of Parcel 1416 square feet in d'PRISTINE @ MEDINI based on the Building Plan annexed in the First Schedule in the T2-18-07 SPA.

- (c) on 11-9-2014, the Plaintiff and the Defendant signed a Sale and Purchase Agreement for the unit known as T1-20-16A ("the T1-20-16A SPA") wherein the Plaintiff agreed to sell and the Defendant agreed to purchase a parcel known as No. Parcel 16A, Type SOFO Deluxe (Intermediate Lot), Floor 20, Building No. T1, Area of Parcel 771 square feet in d'PRISTINE @ MEDINI based on the Building Plan annexed in the First Schedule in the T1-20-16A SPA. (hereinafter collectively referred to as "the said SPAs").
- (d) on 22-1-2019, the Defendant sent a letter to the Plaintiff to notify the Plaintiff that the CCC has been issued for the parcel T2-18-07 and that the vacant possession is ready to be delivered ("the T2-18-07 letter").
- (e) on 4-3-2019, the Defendant sent a letter to the Plaintiff to notify the Plaintiff that the CCC has been issued for the parcel T1-20-16A and that the vacant possession is ready to be delivered ("the T1-20-16A letter"). (hereinafter collectively referred to as "the said Letters").
- (f) according to both of the SPAs, the Defendant is required to obtain the CCC in accordance to the Building Plan.



- (g) Clause 26 Manner of Delivery of Vacant Possession provides that such possession shall not give the Purchase the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the CCC is issued.
- (h) the Defendant failed to obtain the CCC for the Building, and instead, have only obtained a Partial CCC for both of the Units.
- (i) at all material times, the Plaintiff have fully settled the payments for both of the Units. However, the Defendant has yet to complete the office block, the hotel and the shopping complex as stated in the Building Plans.
- (j) the Plaintiff made complaints with the Defendant but the Defendant did not provide any explanation regarding their failure to complete the whole of the mixed-use commercial development based on the Building Plans.

***The Plaintiff's contentions***

[5] The Plaintiff contended that its claims should not be strike out because –

- (a) the Defendant had breached the fundamental terms of the said SPAs when the Defendant failed to deliver CCC to the Plaintiff for both the T2-18-07 and T1-20-16A units; and to deliver the Building Plans to the Plaintiff which is supposed to be annexed in the First Schedule of the T2-18-07 SPA and the T1-20-16A SPA.



- (b) the Plaintiff had the rights to rescind a contract flowing from a breach may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance (see: Section 40 Contracts Act 1950).
- (c) the concept of fundamental breach was explained in the Court of Appeal case of **Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675**, wherein Gopal Sri Ram JCA held that –

*“Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, i.e. the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it.”.*

- (d) there are issues to be tried by way of witnesses’ evidence to be called and answered the following issues:
- (i) whether the Defendant had breached the fundamental terms of both the SPAs when the Defendant failed to deliver CCC to the Plaintiff? Clause 25(1) of the SPAs provides that the Defendant shall deliver vacant



possession to the Plaintiff within 54 calendar months from the date of the Agreement.

- (ii) whether the issuance of the CCC means that the vacant possession is ready to be delivered?
- (iii) whether a partial CCC instead of a CCC for both the units T2-18-07 and T1-20-16A meant the vacant possession the vacant possession is given and delivered?
- (iv) whether the non-delivery of vacant possession with the CCC forms a fundamental part of the contract entered between the Plaintiff and the Defendant and thus it strikes to the root of the contract?
- (v) whether the Defendant had breached the fundamental terms of both the SPAs when the Defendant did not provide the Building Plans that is supposed to be annexed in the First Schedule of the SPAs?
- (vi) whether the Plaintiff had agreed to the revised schedule of parcels and amendment towards the Building Plan as stipulated in the Defence?



[6] Even though the matter is at the striking out stage, the learned counsel for the Plaintiff urged this Court to critically examine the evidence and make a finding as to the viability of the Plaintiff's suit, as provided in the case of **Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1**.

If the claim is bound to fail, it must be struck out, as the High Court always has an inherent jurisdiction to prevent abuse of its process.

[7] The learned counsel for the Plaintiff submitted that the Defendant was bound by its promise to deliver the CCC based on the pre-amended approved Building Plans that was supposed to be attached together with the SPA (of which the Defendant failed, refused and/or neglected to attach).

[8] The Defendant had amended the approved Building Plans at its convenience, and this was not agreed by the Plaintiff. Therefore, the Defendant did not perform its promises to deliver CCC based on the pre-amended approved Building Plans.

[9] The Defendant had circumvented the proper legal procedure in regards to amendment or revision to the approved Building Plans so as to deliver vacant possession to the Plaintiff with only a partial CCC instead of a complete CCC as per the pre-amended approved Building Plans to the detriment of the Plaintiff. Again, this was not agreed by the Plaintiff at all material times.

Thus, the Plaintiff was severely prejudiced and its right as a purchaser is infringed.





[10] The Defendant had committed a serious breach of the said SPAs by way of –

- (a) the Defendant had unilaterally amended the approved Building Plans without the consent from the Plaintiff;
- (b) at its convenience, Defendant had delivered vacant possession together with a partial CCC based on the amended Building Plans; and
- (c) the Defendant did not perform its part of the promise / obligation based on the SPAs executed to deliver a complete CCC based on the pre-amended approved Building Plans.

### ***The Decision***

[11] On 20-4-2022, the Court dismiss the application to strike out the Plaintiff's claims with costs (subject to allocator fees) –

*“Mahkamah ini telah meneliti Notis Permohonan yang difailkan oleh Defendan, kertas kausa, afidavit dan hujahan bertulis serta nas undang-undang tambahan.*

*Pada peringkat ini untuk membatalkan tuntutan adalah tidak adil. Mahkamah ini mendapati terdapat persoalan fakta dan undang-undang yang menimbulkan keraguan munasabah mengenai tuntutan dan pembelaan.*



*Mahkamah ini perlu meneliti keseluruhan keterangan melalui suatu perbicaraan penuh dengan saksi-saksi hadir untuk pihak-pihak membuktikan mengenai pertikaian.*

*Alasan permohonan untuk membatalkan tuntutan memerlukan jawapan melalui keterangan saksi-saksi mengenai perkara yang dibangkitkan. Sekadar membaca afidavit dan hujahan adalah tidak memadai.*

*Dengan ini, Mahkamah ini **memutuskan untuk menolak Lampiran 9 dengan kos sebanyak RM4,000.00 (tertakluk kepada fi alokatur) dibayar oleh Defendan kepada Plaintiff.***

[12] The Defendant appeal. This judgment contains the reasons for my decision in dismissing the application in striking out the claims.

### ***The Law***

[13] Order 18, rule 19 provides –

***“Striking out pleadings and endorsements (O. 18, r. 19)***

“19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;



(c) it may prejudice, embarrass or delay the fair trial of the action;  
or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).”.

[14] In order for this case to be strike out, this Court must diligently follow the principle of laws as decided in judgment of YAA Mohamed Dzaidin SCJ i.e in the case of **Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Berhad [1993] 4 CLJ 7–**

*“The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ (see *AG of Duchy of Lancaster v. L & NW Rly Co* 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari*



*materia with our O 33 r 2 of the RHC) (see Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.*”  
(emphazied added)

### ***Evaluations and Findings of this Court***

[15] The issue to be decided is whether the Plaintiff's claims are “*plain and obvious*”, whether there is any credible evidence to prove the claims as stated in the statement of claim had occurred or not in order for the Plaintiff to say there is a cause of action against the Defendant.

[16] Next, this Court must decide the Defendant's application whether the Defendant is protected under the provision of Order 18 rule 19 to protect them from vexed by hopeless litigation.

[17] Further, the issue whether the defence and reasons to strike out meet all the tests as decided in the case of **Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Berhad**.

[18] Let me now analyze the Defendant's contentions. The learned counsel for the Defendant contended that obviously can be see that the Plaintiff's Application is doomed to failed considering that the Plaintiff lacks any merit in its claims against the Defendant. Therefore, this Court must allow the Defendant's application to strike out the Plaintiff's claim under Enclosure 9 with costs.



[19] Based on the Defendant's contentions, it is crystal clear that the Defendant strongly stated that the Plaintiffs had misconceived in its claims by stating that–

- (a) the Defendant has breached the fundamental terms of the SPAs and the Housing Developer (Control and Licensing) Act 1966 ("HDA") by failing to deliver the vacant possessions to the Plaintiff;
- (b) the Defendant has misrepresented the Plaintiff regarding the true terms of the agreement when the parties entered into the SPAs;
- (c) the Plaintiff has revealed new issues and facts which were never pleaded by the Plaintiff in any of the Plaintiff's cause papers or in the Plaintiff's Affidavit in Reply, namely–
  - (i) the Plaintiff has suddenly alleged that the Defendant has breached the terms of the HDA by failing to deliver the CCC as accordance to section 3 of the HDA; and
  - (ii) the Defendant had breached the terms of the SPAs by failing to obtained the Plaintiff's permission before amending the Building Plan.

[20] This Court disagree with the Defendant. There are no new issues and facts in any of the Plaintiff's pleadings and affidavit. The Plaintiff claims are for the breach of Defendant's obligations as stipulated in the SPAd. It is not at this stage by way of interlocutory application, to say that



the Plaintiff's claims are thoroughly unjust and prejudicial against the Defendant.

[21] The cases as cited by the Defendant –

- (a) **Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428** where the Supreme Court has held as follows:

*“where a vital issue was not raised in the pleadings it could not be allowed to be argues and to succeed on appeal”.*

- (b) **Pradeep Kumar a/l Om Prakash Sharma v Abdullah Sani bin Hashim [2009] 2 MLJ 685**, the Court of Appeal has also held as follows

*“...in other words, the matters on which the parties are at issue are determinably by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. 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 of its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance... .. The judge therefore found for the plaintiff on an unpleaded case. This is plainly wrong and as a pure matter of procedural law if it manifestly unjust”.*

[22] The statement of claims had stated particulars of the Defendant’s breach based on the chronology, documents and the SPAs. Therefore, only in the full trial this Court will decide on whether Plaintiff’s statement of claim is obviously sustainable.

[23] This Court should not shut down the Plaintiff’s claims by only reading that the Plaintiff’s submission to conclude that the Plaintiff claims must be disregarded is highly unjust.

[24] The Defendant averred that the SPAs entered between parties are clearly not a contract of a housing development under the HDA and the Plaintiff cannot now plead *non est factum*, then the Defendant must and should rebut them during and in the full trial.

Let this Court decide also on the following:

- (a) whether the SPAs entered between parties are not a contract of a housing development under the HAD.
- (b) whether the Plaintiff went out of the tangent of the true and intended terms of the SPAs.



- (c) whether the concept of construction in the present case is of a totally different nature than that of Schedule H of the HDA.
- (d) whether the Plaintiff's claims are an afterthought. The Plaintiff was all fully aware of the nature of the agreements them so willingly signed (which are clearly not a housing development under the HDA) therefore this present claim is merely an afterthought founded in greed.
- (e) whether there is an infringement of the by the Defendant
- (f) whether there were any elements of false representation by the Defendant, which ultimately induced the Plaintiff into entering the SPAs.
- (g) whether the Plaintiff has clearly misinterpreted the clauses. the term "the Building" referred to in the SPAs.

[25] When the Plaintiff asserts that the vacant possession was never delivered to the Plaintiff, this assertion must be proved by the Plaintiff in the full trial.

[26] This Court should not just ignore the Plaintiff's issues as follows:

- (a) whether the Defendant had breached the fundamental terms of both the SPAs when the Defendant failed to deliver CCC to the Plaintiff?





- (b) whether the Defendant had breached the fundamental terms of both the SPAs when the Defendant did not provide the Building Plans that is supposed to be annexed in the First Schedule of the SPAs?
- (c) whether the Defendants had breached the terms of the SPAs by unilaterally amending the Building Plans?
- (d) whether the Defendant had misrepresented to the Plaintiff as to the development of the project when the Plaintiff and the Defendant executed the SPAs?

[27] In order for the Plaintiff to succeed in its claim, definitely this Court must hear the answers from the Plaintiff pertaining to the reasons and issues raised by the Defendant in this striking out application. Arguments via affidavits and submissions cannot satisfy this Court. A full trial is absolutely necessary to shed light to the case before hand, especially when witnesses are called to testify.

[28] Before this Court hear the whole story *via* the full trial, the Defendant had filed striking out made under Order 18, rule 19 (1)(b), and/or (d) Rules of Court 2012 [*P.U(A) 205/2012*] against the Plaintiff and pleaded that the Plaintiff's Writ Summons & Statement of Claim discloses no reasonable cause of action; and/or is scandalous, frivolous or vexatious; and/or is otherwise an abuse of the process of the Court.



[29] The issues raised by the Defendant need this Court to exercise diligently and judiciously its powers under Order 18 Rule 19 (1) (b) and/or (d) of the ROC 2012 and/or its inherent jurisdiction to strike out the claim herein.

[30] For finality of the litigation, this Court must hear the evidence by all the witnesses to be called.

[31] In this regard, reference to the following passage from the judgment of the Court of Appeal in **Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors [2015] 2 MLJ 117** would not be out of place –

*“Even though the burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities, it must present its case sufficiently clearly to do so. It cannot merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issue and expect the court to make out the case on its own for one party or other. ... Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed.”.*

[32] This Court is satisfied upon a balance of probabilities that the Defendant is not qualified to strike out the Plaintiff's action.

[33] This Court had given the instruction on the pre-trial case management and to set the full trial dates. Let the parties argue on all the issues raised. The interlocutory application is not the way to let the Defendant win its case nor the Plaintiff. The best evidence produced before this Court in the full trial will resolved the claims.



### ***Conclusion***

[34] In view of the foregoing, it is my judgment that having evaluated **Enclosure 9** and its supporting documents, I find that the Plaintiff has succeed to establish that there is cause of action against the Defendant. As such, I dismiss **Enclosure 9**, with costs.

**Dated: 13 May 2022.**

*Rozi Bainon*

**( ROZI BINTI BAINON )**

***Judicial Commissioner***

***High Court NCvC12***

***Shah Alam***

### **The Counsels:**

***For the Defendant/Appellant :*** Noor Amalina Binti Mursiedy  
Tetuan Hashim Amran Tabian Ahmad  
Shah Alam, Selangor

***For the Plaintiff/Respondent :*** Lee Hwai Mien  
Tetuan Jacqueline Lee & Co  
Petaling Jaya, Selangor

