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1. [*Fadzilah bt Zainu Hasri v Lembaga Pembiayaan Perumahan Sektor Awam \[2020\] MLJU 2029*](#)

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FADZILAH BINTI ZAINU HASRI v LEMBAGA PEMBIAYAAAN PERUMAHAN SEKTOR AWAM

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| [2020] MLJU 2029

Fadzilah bt Zainu Hasri v Lembaga Pembiayaan Perumahan Sektor Awam [2020] MLJU 2029

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

ALICE LOKE YEE CHING JC

RAYUAN SIVIL NO BA-12ANCVC-169-10/2019

19 November 2020

*Mohamad Fauzi b Abd Samad (Mohammed Nasser Yusof with him) (Marshita Surin & Assoc) for the plaintiff.
Muhammad **Akram** b Dr Abdul Aziz (The Law Chambers of Fauzi & Nasser) for the defendant.*

Alice Loke Yee Ching JC:

GROUND OF JUDGMENTIntroduction

[1]On 11.10.2019, the Sessions Court dismissed the Defendant's application in enclosure 21 to strike out the suit of the Plaintiff and ordered that costs of RM 3000 be paid. It is in respect of the dismissal of enclosure 21 that the Defendant now appeals.

Background facts

[2]For ease of reference, the parties will be referred to as Plaintiff and Defendant, as they were in the proceedings in the Sessions Court. The pleaded case of the parties and the affidavit evidence in relation to the striking out application of the Defendant discloses the following facts.

[3]The Plaintiff is a statutory body established by an Act of Parliament, the Public Sector Home Financing Board Act 2015. [Act 767]. Its functions include administering the public sector home financing facility. By a vesting order P.U (A) 321/2015, with effect from 1.1.2016, all properties, rights, interests, obligations and liabilities of the Government relating to the administration of loan under the Housing Loans Fund Act 1971 became transferred to and vested in the Board.

[4]The Defendant is a public servant. On 12.2.2009 she entered into a Sale and Purchase Agreement with one Mohd Azmi bin Mat Nayan to purchase a property held under Hakmilik Geran 68462, Lot 11800, Mukim Bukit Raja, Daerah Petaling, Negeri Selangor Darul Ehsan ("**the said property**") for a price of RM 260,000.

[5]At the material time, the said property was charged to Standard Chartered Bank Malaysia Berhad ("**Standard Chartered**") under Charge Presentation No. 47407/2003. A sum of RM 192,146.39 ("**the redemption sum**") was still owing by the vendor.

[6]The Defendant then applied for financing from the Government of Malaysia to finance the purchase of the said property, which loan facility under the Syariah Principle of Al-Bai Bithaman Ajil was approved.

[7]The solicitors acting for the Defendant, Messrs W M Jamil & Partners, vide two letters dated 17.2.2009 and 26.2.2009 addressed to the Housing Loan Division, gave an undertaking to receive the loan sum disbursed as

stakeholders, take action to redeem the charge, cause the charge to be registered in the name of the Government of Malaysia, as well as attend to all necessary documentation for the said purpose.

[8]On 29.6.2009, the Defendant and the Government of Malaysia entered into two agreements referred to as the Property Purchase Agreement and the Property Sale Agreement for the purpose of the financing facility under the Islamic Housing Financing Scheme. Both the agreements will hereinafter be collectively referred to as the Loan Agreement.

[9]The Loan Agreement contained inter alia, the following material terms:-

- (i) the loan amount disbursed to the Defendant was a sum of RM 264,194.00;
- (ii) the said property was to be charged to the Government of Malaysia as security for the loan advanced; and
- (iii) in the event the Defendant permits any judgment to remain unsatisfied, then all monies covenanted to be paid by the Defendant under the loan agreement shall become due and immediately payable.

[10]Following the undertaking given by Messrs W M Jamil and Partners, on 13.7.2009, the Housing Loan Division issued a cheque no. 269316 drawn on CIMB Islamic Bank Berhad for the sum of RM 192,146.39 in favour of Standard Chartered for the account no. 897120493398. The cheque was sent to Messrs W M Jamil and Partners. The solicitors forwarded the cheque intended as the redemption sum to Standard Chartered on 20.7.2009 to settle the housing loan facility granted to the vendor.

[11]Unfortunately, and inexplicably, the amount forwarded as redemption sum was not utilised to redeem the property. It later transpired that the vendor had instead made several withdrawals from his loan account into which the payment of RM192,146.39 was made.

[12]This situation led to a series of suits being filed in the Kuala Lumpur courts, of which Kuala Lumpur High Court vide Civil Suit No: 22NCVC-337-07/2014 is relevant. In 2014, the Defendant filed this suit citing the vendor, M W Jamil & Partners and Standard Chartered as Defendants. The suit was eventually settled by a consent judgment entered into by all parties on 22.6.2015. It was agreed inter alia, that M W Jamil & Partners and the vendor was to pay the Defendant RM 120,000 and RM 10,000 respectively, and the Defendant in turn was to pay RM 230,000 to Standard Chartered. The payment to Standard Chartered was to be made within three months of the consent judgment, and Standard Chartered was to then discharge the Charge on the said property. It was also agreed that in the event the Defendant fails to pay the said amount, Standard Chartered shall be at liberty to deal with the said property.

[13]The Defendant received payment of RM 120,000 from M W Jamil & Partners but did not pay the agreed sum of RM 230,000 to Standard Chartered causing Standard Chartered to exercise its rights to auction off the said property on 8.8.2016 due to the default of the vendor.

[14]In August 2016, the Plaintiff first learnt from the present solicitors for the Defendant that the redemption sum of RM 192,146.39 paid by the Government was not utilised to redeem the property from Standard Chartered. As the said property had been successfully auctioned, the Plaintiff is now left without any security for the loan facility granted to the Defendant.

[15]The Plaintiff then filed the instant suit, premised on a breach of contract. The Defendant is said to have breached the terms of the loan agreement as her failure to pay over the sum of RM 230,000 to Standard Chartered resulted in the loss of the security for the loan. The Plaintiff now claims for the amount of RM 214, 427.72 as the sum due and owing at 30.11.2018 under the loan facility agreement.

Grounds for striking out

[16]The Defendant's application to strike out the Plaintiff's claim is premised on two grounds as follows:-

- (i) the suit is time-barred as it was brought more than 6 years after the date of accrual of the cause of action on 29.6.2009; and
- (ii) the Plaintiff is estopped on the principle of res judicata as a similar suit had been brought in the Kuala Lumpur Sessions Court vide Civil Suit No: WA-A52NCVC-428-07/2017 ("**suit 428**").

Decision of this court

[17]The law on striking out of pleadings is settled. This summary power is only to be exercised in plain and obvious cases and where the claim is obviously unsustainable. This principle has been restated in many cases. (See: *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 1 CLJ 1; See *Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235).

[18]The Defendant's contention that the claim is time-barred is clearly misconceived. As the cause of action is premised on breach of the contract parties entered into, which in this instance is the loan agreement dated 29.6.2009, the date of accrual of the cause of action is not the date of the agreement, but the date the breach occurred. The contention of the Defendant therefore that time runs from 29.6.2009, is clearly wrong.

[19]The Defendant was to pay Standard Chartered the amount of RM 230,000 within three months from 22.6.2015. As she failed to do so, the cause of action would accrue on 22.9.2015, as this was the act of breach which the Plaintiff relies on. As this suit was filed on 22.1.2019, the Plaintiff was well within 6 years stipulated under the law to commence the present action.

[20]The second ground of *res judicata* is also without merits. Suit 428 filed in the Kuala Lumpur Sessions Court was against W M Jamil & Partners, Standard Chartered and the vendor. From the cause papers adduced in evidence, the cause of action was premised on the tort of negligence. The Defendant was not made a party in Suit 428 as there is no reason to found a cause of action in negligence against her. Here, the Defendant is sued for breach of contract.

[21]Consequently, the principles of *res judicata* enunciated in the authorities relied on by the Defendant are of no application. I need refer only to *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 as the leading authority on this point, which held as follows,

What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

.....

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

.....

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s 40 of the *Evidence Act 1950*, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties.

[22]*Res judicata* applies to estop either of the parties to a proceeding from bringing a cause of action which has been determined or could have been brought in earlier proceedings. But where the parties are different, the principle has no application. This principle is therefore of no assistance to the Defendant's contention that the

Plaintiff is estopped from bringing the instant action on the ground that the Plaintiff had filed suit 428. It is immaterial that the facts upon which the instant suit is based are the same as suit 428; the parties and the cause of action in both suits are different.

[23]As the two grounds advanced by the Defendant to strike out the Plaintiff's suit are without merits, the Defendant has failed to satisfy this court that the Plaintiff's claim is an unsustainable one. On the other hand, I am of the view that the factual matrix of this case requires judicial scrutiny and investigation in order to decide on the rights and liabilities of the parties. It raises many questions pertaining to the conveyancing procedure adopted and the role of several parties involved, causing the payment of the amount of RM 192,146.39 to be made to the loan account of the vendor.

[24]The monies were not used to redeem the charge. It was this failure that eventually led Standard Chartered to exercise its right under the relevant loan agreement to auction the said property. The Defendant's liability under such circumstances are factual issues which only a trial can resolve by evidence from the parties.

Conclusion

[25]For the foregoing reasons, the application of the Defendant and consequently, the appeal, is dismissed with no order as to costs.