IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN
[CIVIL SUIT NO: 22NCVC-581 -11/2D18]

BETWEEN

KAMARUDIN BIN MAT AKIB
(l/C NO.: 630312-11-5293) ... PLAINTIFF

AND

1. **KHAIRUL BIN MOHD JAMIL**
   (I/C NO.:70D224-10-5811)
2. **ZAIDAH BT MAT SAID**
   (I/C NO.:720616-04-5254)
   (formerly practicing as an Advocate &
   Solicitor at Messrs. Yacob & Rakan-Rakan)... DEFENDANTS

BEFORE
Y.A. TUAN GUNALAN A/L MUNIANDY
JUDGE, HIGH COURT

GROUNDS OF JUDGMENT

[1] The Plaintiff was at the material time the registered owner of a property comprising a double storey terrace house ·and intended to sell the property to the 1s1 Defendant ('D1') a Sale and Purchase Agreement ('SPA') dated 5.7.1997. This claim which went for full trial is against D1 and his solicitors, the 2nd Defendant ('D2') based on conspiracy, fraud, cheating, etc, to wrongfully deprive the Plaintiff of his property.

Background Facts of Claim

[2] From the Summary of Case filed by the Plaintiff's Solicitor, the material facts are these:

(1) D2 is a Malaysian citizen, of full age currently practicing as an Advocate and Solicitor having an address of service at Messrs Abu Talib Shahrom, No. 39 & 43, Ja,lan Desa, Taman Desa,·Off Jalan Kelang Lama, 58100 Kuala Lumpur.

(2) At all material times around 2003 and 2004, D2 was practising as a lawyer handling conveyancing matters at Messrs Yacob dan Rakan-Rakan at its Kajang branch at 478, Tingkat 2, Jalan Tun Abdul Aziz, 43000 Kajang, Selangor Darul Ehsan.

(3) D1 had known D2 as one of the lawyers who worked at Messrs Yacob. dan RakanRakan at all material t.imes.

(4) The Plaintiff as the Vendor and the D1 as the Purchaser have excuted one (1) agreement, via the Sale and Purchase Agreement (SPA') dated 05.07.1997 (hereinafter referred to as SPA, for the sale and purchase of a property identified as a two storey terrace house located at No. 50, Jalan Rakan 16, Taman Rakan, 43000 Kajang, Selangor Darul Ehsan (hereinafter referred to as 'the said Property'). The Plaintiff and D1 are bound to the terms and conditions of the SPA dated 5.7.1997; and the Agreement was prepared and signed with the intention to bind the Plaintiff and the D1.

(5) D1 purchased the said property for the purchase price of RM185,000.00.

(6) D1 had paid the deposit of RM10,000.00 to the Plaintiff, for the purpose of purchasing the said property.

(7) It was discovered sometime in 2015 that the D1was residing at the said property.

(8) Based on an official search conducted at the Malaysian Bar Council, the Plaintiff discovered that Messrs. Yacob dan Rakan-Rakan, Kajng branch had ceased its operation since 01.01.2005. The search result further revealed that the fo·rmer partner for th Kajang branch which was En. Mohd Bashir bin Abd Kadir, had established a new firm in Bandar Haru Bangi known as Messrs. Bashir dan Rakan-Rakan and he has since ceased from practicing as an Advocate & Solicitor effective from 01.01.2015.

(9) It was found out that D2 had signed a transfer form via Form 14A '(Memorandum of Transfer)' National Land Code (hereinafter referred to as 'the said Form 14A') on 05.03.2004 as a witness for D1 in respect of the said property.

(10) D2 had also signed one (1) Letter of Appointment dated 08.10.2003 as a witness in which the contents of the said letter mentioned, among others, that the Plaintiff had agreed to appoint Messrs. Yacob & Rakan-Rakan to prepare one (1) Discharge of harge and other matters relating to a housing loan for the said property. The Plaintiff's signature in Form 14A and the Plaintiff's signature in Letter of Appointment dated 8.10.2003 have been forged.

(11) D1 has committed conspiracy by way of fraud, cheating and/or negligence together with D2 to take into possession of the said property.

(12) The Plaintiff through his Solicitors had sent a notice of demand to the First Defendant and D2.

D1's Case *I* Defence

(1) Even though the SPA dated 5.7.1997 with the Plaintiff existed, there was also a collateral agreement for the sale and purchase of the said property.

(2) Since 1997 until 2005, the parties carried out and managed the said transaction in accordance with the agreed terms in the collateral agreement.

(3) The 5.7.1997 SPA was only intended to record the sale and purchase transaction of the said property whereas the terms of the SPA were not meant to bind the parties.

D2's Case *I* Defence

(1) This action against D2 was commenced after a lapse of about 14 years since the facts arose around 2003 to 2004.

(2) The Plaintiff's claim has elements of *mala fide* as, yide this claim he intends to obtain unjust enrichment from D2 alone of what he ought to receive from D1.

(3) At all material times, D2 had provided service as a solicitor professionally and *bona fide* taking into account the interests of all the parties concerned and had acted reasonably.

(4) D2 strongly denies the Plaintiff's allegation that the transaction relating to the transfer of the subject property to D1 was tainted .by fraud, cheating and/or conspiracy on her part. Any conspiracy with D1 in this respect is strongly refuted.

(5) D2 maintains that the Plaintiff had full knowledge of all the dealings relating to the property carried out by D2 as the solicitor handling the matter at the material time.

Issues To Be Tried

(1) Whether the First Defendant has committed conspiracy by way _ of fraud, cheating and/or negligence together with D2 to take into possession one (1) two storey terrace house located at No. 50, Jalan Rakan 16, Taman Rakan, 43000 Kajang, Selangor Darul Ehsan held under HS(M) 06849, No. PT 14633, Mukim of Cheras, Tempat Batu 11 1/2, Jalan Cheras, State of Selangor (hereinafter referred to as 'the said Property').

(2) Whether the Plaintiff's signatures in the Form 14A and the Letter of Appointment dated 8/10/2003 have been forged.

(3) Whether there was an agreement or verbal or collateral agreement entered between the Plaintiff and one Hj. Jamil regarding the sale and purchase of the said Property as well as the method of settlement of the balance purchase price of the said Property.

(4) Whether the Plaintiff and the 1st Defendant are bound by the terms and conditions of the Sale and Purchase Agreement dated 5.7.1997 ('SPA'); or whether the SPA

was prepared or signed without the intention to bind the Plaintiff and the 1st Defendant.

(5) Whether the Plaintiff's claims are time barred by the Limitation Act.

Analysi s of Evidence and Findings

[3] The Court, having considered all the admitted *I* undisputed facts and evaluated the evidence of the Plaintiff and the Defendants ('D1 and D2'), including the documentary evidence as a whole comes to the following finding.

[4] D1 is the principal Defendant in this case against whom the Plaintiff has made various allegations such as fraud, conspiracy, cheating, forgery etc., as pleaded that led to the wrongful and loss of the Plaintiff's residential property ('house').

[5] This is the primary and determinant issue in this case which. casts serious aspersions against both D1 and D2. Reliance was placed by the plaintiff, amongst others, on the incriminating evidence of D1· and D2 themselves in regard to the crucial documents and instruments that facilitated the alleged wrongful transfer of the subject property *to* D1.

[6] It would be useful to scrutinise the evidence of D1 and D2 elicited during cross-examination relating to the forgery of the Plaintiff's signature. D1 admitted that he had signed as the Plaintiff over the latter's name in both the Letter of Redemption of Loan and Letter of Appointment of Solicitors (10.1·and 1D2), D2 admitted that 1D2 and 105 (Form 14A) contain her signatures as the attesting witness and the solicitors' firm's rubber stamp indicating that the Plaintiff had placed his signatures on 1D2 and 105 before her and in her presence as the

attesting solicitor but in fact .she did not witness any of these signatures. These documents had admittedly been presigned before D2 placed her signature with the firm's rubber stamp. The fact, thus, remained that she did hot attest the Plaintiff's signatures contrary to what the documents portrayed.

[7] It is crucial to note that there was an admission by D2 that no instruction had been given by the Plaintiff for D1 to sign the documents on his behalf. D2 was aware that a person would only be authorised to sign on behalf of a named signatory on condition that there is a letter of authority issued by the person named which she had not received from the Plaintiff.

[8] D2 was further, by her own admission fully aware of how vital a Form 14A was in a transaction for the sale and purchase of property leading to the transfer of an owner's registered title.

[9] The Court is mindful of the fact that the essence of the Plaintiff's claim is that the instrument of transfer under the National Land Code ('NLC') ie, the Form 14A, is invalid and bad in law because it was never executed by him before the attesting solicitor (D2) but that his signature had been forged. The same goes for the Discharge of Charge issued to the financier, ie, Bank of Commerce Bhd. ('OL') then. As for the Letter of Appointment of the Redemption Solicitors, M/S Yaacob & Rahan ('YRR') and the Letter of Request to BOC for Redemption Sum, D1 admitted having forged the Plaintiff's signature in these letters. D2 admitted being the attesting witness but did not in fact attest or witness the Plaintiff's signatures. D2 also admitted the same in respect of the crucial instrument, ie, Form 1'4A and the Discharge of Charge.

[10] Itwas pointed out that the act of D2 in applying for redemption of the Plaintiff's bank loan and his account details through

forgery of his signature of these documents/instruments was an infringement of the Banking and Financial Institutions Act, 1989 ('BAFIA') and the Financial Services Act, 2D13.

[11] As the solicitor entrusted to act as the attesting witness for the Form 14A in respect of the property owned by the Plaintiff, it was a blatant failure of duty of care to the Plaintiff on her part when she failed to ensure that he had actually executed the Form 14A to part with his property. As a result of this fundamental breach of solicitor's duty by her, albeit on the instruction of the managing partner in the firm, she had by inference facilitated the fraud, chating and/or breach of trust perpetrated by D1 in causing wrongful and unlawful loss of immoveable property to the Plaintiff.

[12] It is trite law that strong circumstantial evidence would be sufficient to sustain a claim based on fraud, cheating, etc. The fraudulent act of D1 in this case is akin to the incident that occurred in the case of *Soon Poy Yong @ Soon Puey Yong v. Westport Property Sdn. Bhd. & Ors.* [2014] MLRHU 20 where the Learned Judge held:

"The burden of proof of fraud or conspiracy beyond reasonable doubt here undoubtedly lies with the Plaintiff. The evidence relied on by the Plaintiff was again circumstantial."

And further that:

"The Second Defendant forged or caused the forgery of the signature of the Plaintiff in the Power of Attorney. He 'engineered and manufactured' IDT2. The sale and purchase agreement dated 25 January 2000 and memorandum of transfer of the Land were signed by him on behalf of the Plaintiff

pursuant to the Power of Attorney without the authorization of the Plaintiff. These were calculated to·defraud the Plaintiff."

[13] In my view, it is undisputable that the elements of the- tort of fraud had been proven against R1 for forgery of the Plaintiffs signature on vital documents, particularly to Letter of Appointment of Solicitor and the Form 14A. It would, thus, be wrong to coming to a contrary conclusion that disregards crucial proven and admitted facts.

[14] Next for consideration is the challenge raised by the Defendants as to the allegation of forgery of the Plaintiff's signature in the Form 14A and the Letter of Appointment of Solicitor which is the foundation of the Plaintiffs claim. His allegation was supported by his police report lodged contemporaneously on the alleged forgery and cheating.

[15] Basically, the Defendant's challenge was that the Plaintiff had failed to adduce any expert evidence/opinion and/or and Expert Report to prove his case. In reply, the Plaintiff relied on the provisions of Section 73(1), Evidence Act, 1950 ('EA') which provides that:

> "Comparison of signature, writing or seal with others admitted or proved 73(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one ·which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose."

[16] ·**it** was submitted that any reliable evidence that goes to prove by the comparison method that the signatures were not genuine would suffice.

[17] It has long has long been settled that in the determination of a dispute, such as the genuiness or forgery of a document that is material to a case, **it** is not incumbent for the party alleging to prove the same to have recourse solely to expert evidence. S. 75, EA may be invoked by the trial Court **in** appropriate circumstances to draw its own 9onclusion of the genuiness of a document and hand writing [See *Mohd Ridzuan Mohd Sidek & Anor v. Hong Leong Bank Bhd.* [2014] 6 MLRH 264].

[18] The Plaintiff's propositions finds ample support in *Wong Swee Chin v. Public Prosecutor* [1980] 1 MLRA 128 where the Federal Court emphasised that:

> "Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion."

[19] Inthe instant case, the Plaintiff adduced evidence of several sample signatures of his in past documents, including his international passport·(genuine signatures) for comparison of the same with the alleged forgery or Questioned ('Q') signature in the Form 14A on Memorandum of Transfer ('MOT'). A careful examination of the features in the genuine signatures and the Q signature revealed a marked and significant difference in ·one important feature highlighted by the Plaintiff that was only to be found in the Q signature: Be that as it may, the Plaintiff was also relying on suspicious surrounding circumstances relating to the execution of the form 14A to prove·his allegation of his signature having been forged.

[20] It is important to note that the Plaintiff's stance all throughout was that he never executed any MOT to transfer the property to D1. Neither D1 nor D2 witnessed the Plaintiff placing his signature on the Form 14A to·disprove his allegation of being totally unaware of the transfer or the instrument having been executed allegedly by him.

[21] In view of the weight of the unrebutted evidence and surrounding circumstances my considered view is that the defence contention was erroneous that the non-calling of an expert witness to prove forgery was fatal to the Plaintiff's case founded on forgery of his signature .in the MOT and other related documents. As in the case of *Soon Poy Yong* (*supra*) the circumstantial evidence in this case inescapably pointed to the transfer documents having been forged when the Plaintiff was away in another state. ·

[22] Thirdly, D1 alleged that besides the written SPA with the Plaintiff, there was in fact an oral agreement between the same parties containing different terms that was binding on them

whereas the SPA was a mere formality to fulfill legal requirements.

[23] Apart from the above assertion not having been proved considering the absence of any credible supporting evidence, it was also noteworthy that the SPA was a complete and comprehensive written agreement with also a retention sum clause inluded where a certain solicitor's firm was appointed a stakeholder to hold that sum subject to prescribed terms. Hence, the co-existence of a subsequent oral agreement to rescind or modify the SPA was wholly improbable. Neither was there anything to indicate that the instant facts fell within the circumstances laid down in the proviso to S. 92, Evidence Act for the purported oral agreement to override the SPA

[24] On the whole, the SPA in this case was an entire agreement binding both parties and was enforceable against them. Any attempt to exclude or vary the agreement by any oral agreement, statement or representation, whether re-contractual or post-contractual would not be tenable. D1 had, on the present facts, clearly failed to prove that there existed on oral agreement to vary the express terms of the SPA.

(See *Master Strike Sdn. Bhd. v. Sterling Heights Sdn. Bhd.* [2005] 1 MLRA 276]

[25] OW2, the father of D1, then alleged that an excess sum of RM36.82942 had been paid to the Plaintiff for the purchase of the subject property by D1. However, prior to his testimony in Court, DW2 had never at any previous instance claimed the alleged excess payment from the Plaintiff before the commencement of this suit. Neither was any counter-claim filed by D1 for a refund of the said excess payment by the Plaintiff. OW2 eventually conceded under cross-examination that no such

excess. payment had been made to the Plaintiff. Hence, this bare allegation that was more of an afterthought remained unproven. Moreover, the Form 14A which was prepared at the instance of D1 on 05.03.2004 states on oath that the consideration for purchase of the property from the Plaintiff is RM185,000.00 which has been paid to him. This is precisely the agreed purchase price in the·SPA. It goes to show without a doubt that there was no excess payment above the consideration value to the Plaintiff and that it was solely the SPA that governed the transaction between the parties and not any extraneous oral agreement or dealing which was shown to be just a figment of 0.1's imagination.

[26] I'll now proceed to the penultimate issue as to whether the Plaintiff and D1 were bound by the terms and conditions of the SPA dated 5.7.1997 or that it was merely executed for formality but without any intention to enter into contractua1 relations binding on the 2 aforesaid contracting parties. This is an issue that is interlinked with the 3rd issue concerning the alleged oral agreement between the Plaintiff and D1 which was allegedly Intended to bind the parties and not the SPA which has already been discussed at length.

[27] The Appellant brought to the Court's attention several key facts that establish that the SPA prevailed over any other agreement and was binding and enforceable on the parties concerned in respect of the subject property. *Inter alia*, the material facts are these:

(i) The SPA provided for the sum of RM10,000.00 to be paid as a deposit and a sum to be retained under the retention sum clause wherein both terms had been complied with by the parties.

(ii) A prusal of the Form 14A presented by D1 through his solicitor ('D2') would reveal that it was in accordance with the terms prescribed in the SPA such as the parties involved, agreed purchase price, etc.

(iii) The Stamp Duty Adjudication Notice followed the sale price stipulated in the SPA as the market value.

(iv) DW2 who claimed to have paid the deposit and rentals to the Plaintiff under the·alleged oral agreement was not a party named in the Form 14A.

[28] Having considered the above facts and all the surrounding circumstances adverted to, I was more than satisfied that the SPA which had all the necessary components of a valid and concluded sale and purchase transaction was fully intended to create legal relations between the Plaintiff and D1 and more importantly to be binding, enforceable and effective until the completion of the transaction. D1's contention that the SPA was not intended to create legal relations but merely entered into as a formality in compliance with legal requirements was devoid of any basis on the facts and evidence at the trial. It remained a bare and unproven assertion that could not defeat the SPA which was the foundation of the present claim.

[29] As to the law on what constitutes a binding contract, the Federal Court in *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 MLRA 97 adopted the exposition given by *Mr. Justice Parker in Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at pp. 288-289 as follows:

"It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplated the -execution of a further contract between the

parties it is a question of construction whether the execution of the further contract is a condition or terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored."

[30] The SPA in the instant case was complete with all the essential features of a binding and concluded contract. No satisfactory evidence was put forth by D1 to the contrary.

[31] With regard to the final issue of limitation under the Limitation Act, 1953 ('LIA'), the applicable provision of the LIA is Section 29, the operative part of which provides as follows:

"29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period ·of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligent have discovered it:...."

[32] This is an action premised principally on fraud against D2 for negligence and breach of fiduciary duties as a solicitor. What is crucial in regard to the issue at hand is the question of when the alleged fraud was discovered.

[33] It was in evidence that the Plaintiff first discovered that his property had been transferred to D1 without his knowledge and consent only in 2015 when he visited the premises and thereafter, carried out an official land search which revealed that D1 had become the registered owner way back in year 2000. The Plaintiff had also given a reasonable and acceptable explanation for the delay in the discovery, in particular as to the reason for visiting the premises only in 2015 which was that his housing loan had been settled only in 2014 and that prior to that he was residing mostly in other states.

[34] Hence, the Plaintiff's proposition, based on the undisputed evidence·as to the discovery of the alleged fraud by D1, that his cause of action began to run only in 2015 was correct in principle and on the present facts. It is settled law that by virtue of the provision of S. 29(a) of the LIA, for an action founded on fraud as in this instance the period of limitation shall not begin to run until the Plaintiff has discovered the fraud.

[See *Phua Lee Hui v. Kee Po King & Anor* [2012] MLRHU 111].

[35] Therefore, the Defendants' contention that this action is barred by limitation under the L/A is baseless and misconceived.

[36] Therefore, having carefully read the pleadings and considered the submissions and replies of counsel, the many issues raised and argued together with the several contentions on the law as per the authorities cited and the facts, I would conclude that based on the proven and undisputed facts the Plaintiff has

proved on a balance of probabilities liability against D1 as pleaded in paragraph 18 of the Statement of Claim ('SOC') and the loss suffered as per paragraph 19 of the Statement of Claim except for conspiracy with D2 to defraud the Plaintiff for which the circumstantial evidence is insufficient and inconsistent with the allegation of dishonesty and *mala fide*. The evidence against D2 for conspiracy as alleged is not conclusive to sustain the claim based on conspiracy.

[37] However, there is a clear and undisputed case against D2 supported by ample evidence to prove gross negligence and breach of professional duties as a solicitor by reason of failing to ensure that the Plaintiff duly executed the crucial letters and instruments in her presence consistent with her statutory duties and role as an attesting witness. This is a serious misconduct on her part notwithstanding that she was only a Legal Assistant and acting on instructions from a senior partner which is no defence to the allegation of professional negligence.

[38] For the above reasons, judgment is entered against D1 for liability as pleaded in paragraph 18, SOC except for the tort of conspiracy with D2. Judgment is entered against D2 for the cause of action as pleaded in paragraph 17.8 of the SOC. Judgment is with costs to be fixed and interest at the usual rate.

[39] Order in Terms of prayers (a), (b), (c), (e) and (h).

[40] Costs of RM40,000.00 to be paid by D1 subject to allocator and - RM25,000.00 to be paid by D2 also subject to allocatur.

Dated: 16 OCTOBER 2D20

(GUNALAN MUNIANDY)
Judge
High Court of Malaya
Shah Alam

Counsel:

For the plaintiff - Noorazmir Zakaria; M/s Akram Hizri Azad & Azmir
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For the 1st defendant - Azmi Mohamed & Nurul Amirah Mohd Zaini; M/s Nazri Azmi lslinda
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For the 2nd defendant - R Rajaswari; M/s Abu Talib Shahrom
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Case(s) referred to:

Soon Poy Yong @ Soon Puey Yong v. Westport Property Sdn. Bhd. & Ors. [2014] MLRHU 20

Mohd Ridzuan Mohd Sidek & Anor v. Hong Leong Bank Bhd. [2014] 6 MLRH 264

Wong Swee Chin v. Public Prosecutor [1980] 1 MLRA 128

Master Strike Sdn. Bhd. v. Sterling Heights Sdn. Bhd. [2005] 1 MLRA 276

Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 MLRA 97

Mr. Justice Parker in Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284

Phua Lee Hui v. Kee Po King & Anor [2012] MLRHU 111

Legislation referred to:

Evidence Act 1950, ss. 73(1), 75, 92

Limitation Act 1953, s. 29(a)