

MIKIEN SDN BHD

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v.

CHERATING DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

B

KANG HWEE GEE J

[COMPANIES WINDING UP NO: D8-28-199-2007]

16 APRIL 2008

CIVIL PROCEDURE: *Judgments and orders - Execution - Specific performance - Whether judgment could be enforced after a winding up order - Order obtained before winding up petition presented against respondent company - Whether applicant obtained equitable title on 192 parcels of shop offices - Whether said lots should not therefore form part of estate of respondent company - Whether official receiver should effect legal transfer of the shops*

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This was an application by the applicant who had obtained a judgment against Cherating Development Sdn Bhd (the respondent in this petition) in respect of its claim for specific performance of 192 sale and purchase agreements entered into between the applicant and the respondent. The judgment was obtained by the applicant on 11 August 2004 well before the company was wound up on 27 June 2007. The petitioning creditor opposed the application by submitting that although the applicant had secured the order of specific performance from the court, it could not enforce the order of the court as any execution of judgment would be void after a winding up order was made. However, it was contended by the applicant that leave ought to be granted in a case concerning specific performance to enforce the transfer of properties as opposed to mere monetary claims.

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Held:

(1) Upon obtaining the judgment for specific performance, the applicant had in fact obtained an equitable title on the 192 parcels of shop offices. All that was now required was for the company to effect a registrable transfer under the National Land Code in favour of the applicant. What the applicant was applying for was essentially to compel a company which had been wound up and whose affairs were now in the hands of the official receiver to specifically perform the High Court Order to convey the 192 parcels of shop offices to the

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A applicant. That order had been obtained well before any
petition was presented against the company. By virtue of the
fact that the applicant was now the equitable owner, the
company was but a bare or resulting trustee of the properties
of the applicant. The 192 parcels should not therefore form
B part of the estate of the respondent company to be distributed
among its creditors. There should accordingly be an order
directing the official receiver to effect a legal transfer of the
192 parcels of shop offices to the applicant. (paras 10, 11 &
12)

C [*Order accordingly.*]

Case(s) referred to:

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC
(*refd*)

D *Mosbert Bhd v. Chatib Kari & Another Case* [1984] 2 CLJ 277; [1984] 1
CLJ (Rep) 270 FC (*refd*)

Mosbert Berhad (in liquidation) v. Stella D’Cruz [1985] 1 LNS 47 FC
(*refd*)

Re Coregrange Ltd [1984] BCLC 453 (*refd*)

Re Cuthbert Lead Smelting Co Ltd [1886] WN 84 (*refd*)

E *Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And
Chow Siew Hon & Ors (Intervenors)* [1993] 1 CLJ 555 HC (*refd*)

Legislation referred to:

Companies Act 1965, ss. 224, 226(3), 293, 298

F **Other source(s) referred to:**

Walter Woon’s Company Law, 2nd edn, pp 701, 704

For the applicant - KL Pang (CK Foong with him); M/s Cheah Teh & Su

For the petitioner - GL Ong; M/s Yee Teck Fah & Co

G *For the official receiver - Miss Norzaimah*

Reported by Suhainah Wahiduddin

JUDGMENT

H **Kang Hwee Gee J:**

This Is My Oral Judgment: (*ex-tempore*)

[1] This is an application by the applicant who had obtained a
judgment against Cherating Development Sdn Bhd (the respondent
I in this petition) in respect of its claim for specific performance of
192 sale and purchase agreements entered into between the
applicant and the respondent *vide* Kuala Lumpur High Court Suit
No. S6-22-206-2002.

[2] Cherating Development Sdn Bhd (the respondent in this petition) had been wound up by this court on 27 June 2007. A

[3] The judgment order that the applicant subsequently obtained in the Kuala Lumpur High Court Suit No. S6-22-206-2002 dated 11 August 2004 is reproduced as follows: B

DALAM MAHKAMAH TINGGI MALAYA DI
KUALA LUMPUR
(BAHAGIAN SIVIL)
GUAMAN NO: S6-22-206-2002

ANTARA C

STADCO SDN BHD
(No. Syarikat: 276078-V) ... PLAINTIF

DAN D

1. CHERATING DEVELOPMENT SDN BHD
(No. Syarikat: 276078-M)
2. WOOLLEY DEVELOPMENT SDN BHD
(No. Syarikat: 369279-T) ... DEFENDAN-
DEFENDAN E

DI HADAPAN YANG ARIF HAKIM
DATUK ABDUL WAHAB BIN PATAIL
PADA 11 HARIBULAN OGOS, 2004 DALAM KAMAR

PENGHAKIMAN F

ATAS PERMOHONAN dalam tindakan ini, Mahkamah memerintahkan bahawa penghakiman sebagaimana diperuntukkan kemudian daripada ini dicatatkan menyebelahi Plaintiff terhadap Defendan-Defendan. G

ADALAH PADA HARI INI DIHAKIMI TERHADAP DEFENDAN PERTAMA bahawa:

- (a) pelaksanaan spesifik bagi 192 Perjanjian-perjanjian Jual Beli yang dimasuki di antara Plaintiff dan Defendan Pertama semuanya bertarikh 6 haribulan Januari, 1997; H
- (b) kebebasan untuk memohon;
- (c) gantirugi untuk kemungkiran kontrak sebagai tambahan kepada pelaksanaan spesifik untuk ditaksirkan oleh Pendaftar; I

- A** (d) faedah ke atas gantirugi yang ditaksirkan [yang diberikan di bawah perenggan (c) di atas] pada kadar 8% setahun dari tarikh taksiran sehingga penyelesaian penuh dan terakhir;
- (e) suatu deklarasi bahawa Defendan Pertama memegang 192 bidang (“parcels”) atas amanah konstruktif bagi Plaintiff;
- B** (f) gantirugi bagi konspirasi, untuk ditaksirkan oleh Pendaftar;
- (g) faedah ke atas gantirugi yang ditaksirkan [yang diberikan di bawah perenggan (f) di atas] pada kadar 8% setahun dari tarikh taksiran sehingga penyelesaian penuh dan terakhir;
- C** (h) kos;

DAN ADALAH PADA HARI INI DIHAKIMI TERHADAP DEFENDAN KEDUA bahawa:-

- D** (a) suatu deklarasi bahawa Defendan Kedua memegang 192 bidang (“parcels”) atas amanah konstruktif untuk Plaintiff;
- (b) suatu perintah bahawa Defendan Kedua akan, dalam suatu tempoh masa yang munasabah dan di dalam apa keadaan pun pada atau sebelum 27 haribulan Februari, 2005;
- E** (i) menyerahkan milikan kosong bagi 192 bidang (“parcels”) tersebut kepada Plaintiff;
- (ii) memohon untuk pecah-bahagi bangunan tersebut;
- F** (iii) mendapatkan pengeluaran hakmilik strata berasingan bagi 192 bidang (“parcels”) tersebut;
- (iv) melaksanakan suatu pindahmilik pelaksanaan yang sah dan boleh didaftar bagi hakmilik strata berasingan untuk 192 bidang (“parcels”) tersebut kepada Plaintiff;
- G** (c) gantirugi bagi konspirasi, untuk ditaksirkan oleh Pendaftar;
- (d) faedah ke atas gantirugi yang ditaksirkan [yang diberikan di bawah perenggan (c) di atas] pada kadar 8% setahun dari tarikh taksiran sehingga penyelesaian penuh dan terakhir;
- H** (e) kos.

Bertarikh 11 haribulan Ogos, 2004.

Sgd.

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I WAN TITIHANI BINTI WAN HAMID
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

[4] The specific order which granted the specific performance to the applicant plaintiff is highlighted by underlining that portion of the judgment relevant to this application. A

[5] The judgment was obtained by the applicant on 11 August 2004 well before the company was wound up on 27 June 2007. B

[6] The application is opposed by the petitioning creditor on the following grounds:

1. The applicant in this case although having secured the order of specific performance from the court cannot enforce the order of the court as any execution of judgment would be void after a winding up order is made. See s. 224 of the Companies Act 1965 which read as follows: C

Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the Court shall be void. D

Until and unless the aforesaid properties are transferred or registered or charged to the applicant Stadco Sdn Bhd, before the winding up order was made, s. 224 would apply to deny the applicant from enforcing the judgment that it obtained. The authority on this proposition is set out in *Walter Woon's Company Law* 2nd edn at p. 701: E

If a judgment creditor has not completed execution or attachment against the company before the commencement of a winding up, whether by the court or voluntary, he may not retain the benefit of his execution as against the liquidator. F

2. Should the order of the court be carried out in spite of the fact that the company had been wound up the transfer of the 192 units of shop offices would be void under s. 293 of the Companies Act 1965 which read as follows: G

Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner. H I

- A 3. The applicant is obliged to show that its claim cannot be dealt
with adequately under the law provided for dealing with the
assets of company which had been wound up as laid down in
Re Cuthbert Lead Smelting Co. Ltd [1886] WN 84 and approved
in *Mosbert Berhad (In Liquidation) v. Stella D’Cruz* [1985] 1
B LNS 47 per Seah SCJ:

In short, the Court will always give an applicant leave if
his claim cannot be dealt with adequately in the winding up
or if the remedy he seeks cannot be given to him in a
winding up proceedings.

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D The onus is on the applicant to show that it could not obtain
the relief it sought through the law obtaining in a winding up
proceeding before it can apply under s. 226(3) for leave to
proceed with the suit. See also *Watta Battery Industries Sdn
Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon &
Ors, (Interveners)* [1993] 1 CLJ 555 which supports the view
of Seah SCJ in *Mosbert*, the primary purpose of which is to
ensure that all claims against the company liquidation which
can be determined by the cheap and summary procedure
available in a winding up.

[7] *The Grounds For Making This Application Are As Follows:*

- F 1. This application is made under s. 226(3) of the Companies Act
1965 which read as follows:

When a winding up order has been made or a provisional
liquidator has been appointed no action or proceeding shall
be proceeded with or commenced against the company
except:

- G (a) by leave of the Court; and
(b) in accordance with such terms as the Court imposes.

- H 2. Leave ought to be granted in a case concerning specific
performance to enforce the transfer of properties as opposed
to mere monetary claims which may come under s. 224 and
s. 298 of the Companies Act 1965. See *Re Coregrange Ltd*
[1984] BCLC 453 per Vinelott J at p. 457:

- I However, if authority for the proposition that a plaintiff will
normally be given leave to commence an action for specific
performance is wanting, it is because the proposition is too
obvious to need support. If a proposing plaintiff has an

unimpugnable claim for specific performance of an agreement to sell property belonging to a company which is being wound up, then it would, it seems to me, be wholly wrong for the court to deprive him of that proprietary right and remit him to a claim for damages. If the plaintiff has an unimpugnable right to specific performance, he is to be treated in equity as the owner of the property to which that right extends, and it would be unjust for the court to deprive him of the property and put it back into the pool for the benefit of unsecured creditors generally. If the plaintiff's claim to specific performance is challenged then *prima facie* the question whether he is entitled to an order should be determined in an action for specific performance and not in an application for leave to commence proceedings.

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See also *Chatib Kari v. Mosbert Bhd.* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 per Justice Shankar:

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In what circumstances is leave granted? In *'The Law of Company Liquidation'* by B.H. McPherson (1980) 2nd Edition published by the Law Book Co. Ltd. Sydney, Australia there appears at page 159 the following passage:

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Leave to Proceed

Cases in which the courts have granted leave to commence or continue proceedings against a company in liquidation can be fairly readily resolved into two principal categories. In one, the determining fact has been the nature of the plaintiff's claim; in the other, the balance of convenience and the demands of justice.

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(a) *Proprietary Claim.* It has been said that where what the plaintiff is claiming from the company is in reality no more than his own property, leave to proceed will be granted as a matter of course ...

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See *Walter Woon* at p. 704:

Leave should also be given where a plaintiff seeks some non-monetary remedy against the company, e.g. recovery of specific property ...

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3. After effecting full payment of the purchase price and obtaining judgment for specific performance of the sale and purchase agreements, the applicant becomes the beneficial owner of the properties in equity. The respondent company is

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A merely a bare or resulting trustee holding the properties on trust for the applicant. See *Mosbert Bhd v. Chatib Kari & Another Case* [1984] 2 CLJ 277; [1984] 1 CLJ (Rep) 270:

B The law which had been consistently followed by the court in this country is that a purchaser of land who has paid the purchase price, until registered as the legal owner, acquires an equitable interest in it. It may well be that the proposed subdivided lots which they purchased did not have the legal status of being separate pieces of land until legally subdivided; nevertheless that fact does not prevent these
C purchasers from acquiring equitable interests to the extent of the area they had purchased.

4. On the question of undue preference the sale and purchase agreements were entered into way back in 1997. The winding up order was made in 2007. There could therefore be no
D question of undue preference.

5. There is no question of the applicant having to claim the properties through the normal process of proving its claim with the official receiver as the claim here is for specific
E performance of properties which it already owned by virtue of the judgment it obtained from the court.

[8] Reply By The Petitioning Creditor

F 1. It would appear now after hearing argument that as observed by the court this application may not come under s. 226(3) requiring leave from this court. If that be the case then it would not be appropriate for this court to make an order in terms of the application.

G Findings And Decision

[9] Having heard the arguments of the parties it would appear that s. 226(3) is only required to be made only where a proceeding against the company is yet to commence or had been
H commenced. It would not apply where a proceeding against the company had commenced and concluded as in this instance. All that remains in this case is the enforcement of the judgment, that is to say, the legal transfer of the 192 parcels of shop offices to the applicant in due compliance with the order of the High Court.

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[10] Upon obtaining the judgment for specific performance, the applicant had in fact obtained an equitable title on the 192 parcels of shop offices. All that is now required is for the company to effect a registrable transfer under the National Land Code in favour of the applicant.

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[11] It must be appreciated right from the start that what the applicant is now applying for is essentially to compel a company which had been wound up and whose affairs are now in the hands of the official receiver to specifically perform the High Court order to convey the 192 parcels of shop offices to the applicant. That order had been obtained well before any petition was presented against the company. By virtue of the fact that the applicant is now the equitable owner, the company is but a bare or resulting trustee of the properties of the applicant. The 192 parcels should not therefore form part of the estate of the respondent company to be distributed among its creditors.

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[12] There shall accordingly be an order directing the official receiver to effect a legal transfer of the 192 parcels of shop offices to the applicant.

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[13] The petitioner shall pay the costs of this application to the applicant.

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