

PETER TANG SWEE GUAN

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v.

SUBRAMANIAM AV SANKAR & ORS

COURT OF APPEAL, PUTRAJAYA

B

MOKHTAR SIDIN JCA

ZULKEFLI MAKINUDIN JCA

LOW HOP BING JCA

[APPEAL NO: W-02-845-03]

24 JULY 2008

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***CONTRACT:** Construction - Agreements - Sale and purchase of shares - Alleged partners claiming share to profits - Whether defendant executed agreements on his behalf and on behalf of the plaintiffs as partners - Approach to question of construction*

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By an agreement executed with one Ayeob, the defendant/appellant purchased the latter's shareholding in Giat Galian Sdn Bhd ('Giat Galian') for a consideration of RM8,099,995.20 ('exh. P1'). Having acquired the shares, the defendant then executed an agreement with Tanda Perwira Sdn Bhd ('Tanda Perwira') and sold the shares to Tanda Perwira for RM10,462,493.80 ('exh. D11'), thereby raking a profit of RM2,362,498.60. The plaintiffs/respondents alleged that the defendant, in transacting the two agreements, were acting as their nominee/partner, and in the circumstances claimed for a share of the profits hereof. The defendant retorted that the agreements were personal to him and were executed on account of his relationship with the beneficial owner of the shares ('Tan Sri Aziz'), and further that the plaintiffs had no role, involvement or interest whatsoever in the transactions. The learned judge below however sustained the plaintiffs' submission and hence gave judgment to the plaintiffs in the sum of RM1,387,123.90. The defendant appealed and before the learned justices of appeal, an issue arose as to whether the two agreements herein, upon their true construction, were executed by the defendant on his own behalf only, or on his as well as the plaintiffs' behalf as partners.

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Held (allowing appeal)

Per Low Hop Bing JCA delivering the judgment of the court:

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- (1) Exhibit P1 was executed between the defendant as purchaser and Ayeob as vendor and the defendant was not expressly or impliedly referred to as having acted in a representative

- A capacity or for and on behalf of the plaintiffs. Payment of the consideration was also effected by the defendant and by him only. As a matter of true construction, the transaction in exh. P1 therefore was wholly and exclusively between the defendant and Ayeob, and no one else. Further, there was no contractual provision, express or implied, in relation to the existence of any partnership between the plaintiffs and the defendant. (para 15)
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- (2) Exhibit D11 was executed between the defendant as vendor and Tanda Perwira as purchaser. As in exh. P1, exh. D11 had never either expressly or impliedly referred to the defendant as the representative or partner of the plaintiffs and there was just nothing by which the defendant could be construed as having acted as the representative, nominee or front man for the plaintiffs. Payment of the consideration was also made by Tanda Perwira to the defendant in his personal capacity. The transaction stated in exh D11 was thus wholly and exclusively entered into between the defendant and Tanda Perwira and the issue of partnership had never been expressly or impliedly referred to therein. (para 16)
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- (3) The evidence of Tan Sri Aziz confirmed that he did not deal with the plaintiffs in respect of the two agreements. This evidence together with the two agreements have titled the balance of probabilities in favour of the defendant, namely that the defendant had executed the two agreements on his own behalf and in his own capacity. The High Court decision is therefore plainly erroneous and unsustainable.
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Bahasa Malaysia Translation Of Headnotes

- G Melalui satu perjanjian yang dimeterai dengan seorang Ayeob, defendan/perayu membeli pegangan saham pihak terkemudian tersebut di dalam Giat Galian Sdn Bhd ('Giat Galian') untuk balasan RM8,099,995.20 ('eks. P1'). Setelah membeli saham-saham, defendan memeterai perjanjian dengan Tanda Perwira Sdn Bhd ('Tanda Perwira') dan menjual saham-saham tersebut kepada Tanda Perwira dengan harga RM10,462,493.80 ('eks. D11'), sekaligus memperoleh keuntungan sebanyak RM2,362,498.60. Plaintiff-plaintif/responden-responden mendakwa bahawa defendan, dalam memeterai kedua-dua perjanjian, bertindak sebagai nomini/rakan kongsi mereka, dan dengan itu menuntut sebahagian dari keuntungan di atas. Defendan membantah dan menegaskan
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bahawa perjanjian-perjanjian adalah transaksi peribadi beliau dan dimeterai berasaskan perhubungannya dengan pemilik benefisial saham ('Tan Sri Aziz'), dan bahawa plaintif-plaintif langsung tiada peranan, penglibatan ataupun kepentingan di dalam transaksi. Yang arif hakim di bawah bagaimanapun menerimapakai hujah plaintif-plaintif dan dengan itu memberi penghakiman kepada mereka berjumlah RM1,387,123.90. Defendan merayu dan di hadapan yang arif hakim-hakim rayuan, isu berbangkit mengenai sama ada kedua-dua perjanjian di sini, atas pentafsirannya yang sebenar, dimasuki oleh defendan bagi pihak dirinya sahaja, ataupun bagi pihak dirinya dan juga plaintif-plaintif selaku rakan-rakan kongsinya.

Diputuskan (membenarkan rayuan)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

- (1) Eksibit P1 telah dimeterai di antara defendan selaku pembeli dengan Ayeob selaku penjual dan defendan tidak sama ada secara nyata atau tersirat dirujuk sebagai bertindak dalam kapasiti representatif atau untuk dan bagi pihak plaintif-plaintif. Pembayaran balasan juga dibuat oleh defendan dan oleh dia sahaja. Maka itu, sebagai satu perkara tafsiran, transaksi di dalam eks. P1 adalah secara keseluruhan dan eksklusifnya di antara defendan dan Ayeob, tanpa melibatkan pihak-pihak lain. Selain itu, tiada apa-apa peruntukan kontraktual, sama ada secara nyata atau tersirat, berhubung dengan kewujudan mana-mana perkongsian di antara plaintif-plaintif dan defendan.
- (2) D11 telah dimeterai di antara defendan selaku penjual dan Tanda Perwira selaku pembeli. Seperti eks. P1, eks. D11 tidak pernah sama ada secara nyata atau tersirat merujuk kepada defendan sebagai wakil atau rakan kongsi plaintif-plaintif dan tiada suatu apapun di situ yang membolehkan defendan ditafsir sebagai bertindak sebagai wakil, nomini atau orang hadapan plaintif-plaintif. Pembayaran balasan juga dibuat Tanda Perwira kepada defendan atas nama peribadi defendan. Oleh itu transaksi di eks. D11 adalah secara keseluruhan dan eksklusifnya dimasuki di antara defendan dan Tanda Perwira dan isu perkongsian langsung tidak dirujuk di situ sama ada secara nyata atau tersirat.

- A (3) Keterangan Tan Sri Aziz mengesahkan bahawa beliau tidak berurusan dengan plaintif-plaintif berkaitan kedua-dua perjanjian. Keterangan ini bersekali dengan kedua-dua perjanjian telah menjungkit imbangan kebarangkalian menyebelahi pihak defendan, iaitu bahawa defendan memetri
- B kedua-dua perjanjian atas kapasiti dan bagi pihak dirinya sendiri. Oleh itu keputusan Mahkamah Tinggi jelas khilaf dan tidak boleh dipertahankan.

Case(s) referred to:

- C *Antaios Cia Naviera SA v. Salen Rederiena AB, The Antaios [1984] 3 All ER 229 (refd)*
Investors Building Scheme v. West Bromwich Building Society [1998] 1 All ER 98 (refd)
Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352 (refd)

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

Visu Sinnadurai, *Law of Contract*, 2003, vol 1, p 214, para 4.64

For the appellant/defendant - S Periasamy (M Nagarajah, Mr Kumar & Chrystiantini Niles with him); M/s Maha & Peri

- E *For the respondents/plaintiffs - Malik Intiaz Sarwar (Mathew Thomas Philip with him); M/s Thomas Philip*

[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-558-1996]

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Low Hop Bing JCA:

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Appeal

- H [1] On 8 September 2003, the Kuala Lumpur High Court gave judgment for the respondents (“the plaintiffs”) in the sum of RM1,387,123.90, together with interest thereon at the rate of 8% per annum from 19 August 1996 to the date of realization, and costs (“the High Court decision”). Being dissatisfied, the appellant (“the defendant”) has appealed against the High Court decision.

- I [2] On 9 January 2007, we heard and unanimously allowed the defendant’s appeal. Thereafter, the plaintiffs applied for leave to appeal to the Federal Court. We now give our grounds of judgment.

Undisputed Facts

[3] Giat Galian Sdn. Bhd (“Giat Galian”) is a private limited company with a paid up and issued share capital of 10,002 shares. Although one share and 10,001 shares were registered in the name of one Mahshad @ Mahshar bin Ismail (“Mahshad”) and one Ayeob bin Jauhari (“Ayeob”) respectively, the actual beneficial owner thereof was one Tan Sri Abdul Aziz bin Zain (“Tan Sri Aziz”). Giat Galian’s only asset is a block of 3,374,998 shares in Trenergy Berhad, a public company listed on the then Kuala Lumpur Stock Exchange (now Bursa Malaysia).

[4] On 15 June 1993, the defendant entered into an agreement, exh. P1, with Ayeob for the purchase of 10,001 Giat Galian shares at a consideration of RM8,099,995.20 (“the Giat Galian agreement”). Prior to this, the defendant had already acquired one Giat Galian share from Mahshad.

[5] On the same date, the defendant also entered into an agreement, exh. D11, with Tanda Perwira Sdn. Bhd for the sale of the 10,002 shares in Giat Galian to Tanda Perwira at a consideration of RM10,462,493.80. (“the Tanda Perwira agreement”). The actual beneficial owner, Tan Sri Aziz, testified that he did not deal with the plaintiffs in respect of these shares.

[6] The defendant made a profit of RM2,362,498.60 (ie RM10,462,493.80 – 8,099,995.20) from the sale of the aforesaid shares.

Pleadings

[7] The plaintiffs’ fourth amended statement of claim averred, *inter alia*, that:

- (1) The plaintiffs were the ones who found the opportunity to purchase and sell the Trenergy shares;
- (2) The defendant was the plaintiffs’ nominee;
- (3) The defendant and the plaintiffs were partners; and
- (4) The profits should be shared equally *inter se* ie 1/4 each or 3/4 for the three plaintiffs.

- A [8] The defendant's defence is that, *inter alia*:
- (1) the two agreements were personal to him and they were executed by him because of his relationship with Tan Sri Aziz who had given the opportunity to him personally; and
- B (2) the plaintiffs had no role, involvement or interest therein.

Defendant's Execution Of Agreements

- C [9] It was submitted by Mr S. Periasamy (Mr. M. Nagarajah, Mr. M. Kumar and Ms. Chrystiantini Niles with him) for the defendant that the two agreements were executed by the defendant on his own behalf only and so the plaintiffs were not entitled to their claim.

- D [10] Plaintiffs' learned counsel, Mr Malik Imtiaz Sarwar, assisted by Mr. Mathew Thomas Philip, contended that the defendant had entered into the two agreements not only on his own behalf but also on behalf of the plaintiffs, as partners and so the profits should be divided equally between the defendant and the plaintiffs.

- E [11] The learned trial judge sustained the plaintiffs' submission, allowed the plaintiffs' claim and made an order in terms as alluded to above. Hence, the instant appeal.

- F [12] Given the aforesaid background, the question for determination in the instant appeal may be identified as follows:

Upon a true construction of the two agreements *viz* the Giat Galian agreement Exh P1 and the Tanda Perwira agreement Exh D11, were these two agreements executed by the defendant on his own behalf only?

- G [13] The Giat Galian agreement, exh. P1, and the Tanda Perwira agreement, exh. D11, are to be found at pp. 416 to 491, and 492 to 596 respectively, of the appeal record (Bahagian B).

- H [14] As these two agreements are documented wholly in writing, the construction thereof by way of interpretation shall be by reference to specific principles. In *Investors Building Scheme v. West Bromwich Building Society* [1998] 1 All ER 98 at pp. 114 to 115 HL, Lord Hoffman introduced a new approach and propounded the relevant principles of interpretation which may be culled as follows:
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- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. **A**
- (2) The background is the ‘matrix of fact’, reasonably available to the parties and, subject to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. **B**
- (3) The law excluded from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. **C**
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co. Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945). **D**
- (5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v. Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201: **E**
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A ... If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

B (See also Visu Sinnadurai on *Law of Contract*, 2003, vol 1 p. 214 para 4.64).

[15] Applying the aforesaid principles of interpretation to the two agreements, it is to be noted that the Giat Galian agreement in exh. P1 was executed between the defendant as purchaser and Ayeob as vendor. The subject matter was the sale of 10,001 shares in Giat Galian by Ayeob to the defendant, at a consideration of RM8,099,995.20. No other party was included in exh. P1. The defendant was not expressly or impliedly referred to as having acted in a representative capacity, nor was he stated to have acted for and on behalf of the plaintiffs. Payment of the consideration was effected by the defendant for the purpose of the purchase of the shares. No other person ever made any payment therefor. As a matter of true construction, the transaction in exh. P1 was wholly and exclusively between the defendant and Ayeob, and no one else. There was also no contractual provision, express or implied, in relation to the existence of any partnership between the plaintiffs and the defendant.

[16] Next, the Tanda Perwira agreement in exh. D11 was executed between the defendant as vendor, and Tanda Perwira as purchaser. The subject matter was the sale by the defendant of 10,002 shares in Giat Galian at a consideration of RM10,462,493.80. As in exh. P1, exh. D11 had never either expressly or impliedly referred to the defendant as a representative or partner of the plaintiffs. Payment of the consideration was made by the purchaser, Tanda Perwira, to the defendant as the vendor in his personal capacity. There was no express or implied provision by which the defendant could be construed as having acted as the representative, nominee or front man for the plaintiffs. The transaction stated in exh. D11 was also wholly and exclusively entered into between the defendant and Tanda Perwira. The issue of partnership had never been expressly or impliedly referred to in exh. D11.

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[17] The evidence of Tan Sri Aziz, the actual beneficial owner of the shares, confirmed that he did not deal with the plaintiffs in respect of the two agreements. This evidence which provides the background ie the matrix of fact, and the two agreements which contain clear and unambiguous clauses, have in effect tilted the balance of probabilities in favour of the defendant ie, the defendant had executed the two agreements on his own behalf and in his own capacity, and hence militate against the plaintiffs' claim.

[18] The High Court decision is therefore plainly erroneous and unsustainable.

[19] That being the case, our answer to the above question for determination is in the affirmative.

Conclusion

[20] The foregoing grounds led us to unanimously allow this appeal, set aside the High Court decision and dismiss the plaintiffs' claim with costs here and below. Deposit to be refunded to the defendant.

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