

Marvelgold Development Sdn Bhd v Majlis Daerah Penampang (Penampang District Council) & Anor
[2018] MLJU 867

Malayan Law Journal Unreported

HIGH COURT (SANDAKAN)

BEXTER AGAS MICHAEL JC

ORIGINATING SUMMONS NO BKI-24NCvC-86/8 OF 2017 (HC2)

1 April 2018

Grace Chaw (Grace Chaw & Co) for the plaintiff.

PK Lim (PK Lim & Co) for the first defendant.

Baldev Singh (Baldev Gan & Assoc) for the second defendant.

Bexter Agas Michael JC:

Grounds of Decision

(In respect of Enclosure 10)

Introduction

This is the 1st Defendant's Notice of Application (Enclosure 10) to strike out the Plaintiff's Originating Summons (Enclosure 1) on the grounds that the Plaintiff's action is defective, irregular and an abuse of the Court's process as the Plaintiff's alleged claims against the 1st Defendant were based solely on public law relating to the development and implementation of projects/buildings on land, and as such, the Plaintiff must adhere to the procedure prescribed under Order 53 of the [Rules of Court, 2012](#) which sets out a specific procedure for an aggrieved party seeking relief against the public authority concerning an infringed right under public law.

Brief Facts

The Plaintiff has completed the construction of a residential condominium located in the District of Penampang known as The Garden @ Bundusan ("the Garden"). The 2nd Defendant had erected a fencing along the road reserve causing interruption to the use of the right of way over and along the road reserve as access to the Garden.

Meetings and dialogues were held between the parties with a view to resolve the access but to no avail. With the issuance of the Architect's Certificate of Practical Completion in November 2016 together with obtaining all letters in support from the relevant authorities, the architect submitted an application to the 1st Defendant for issuance of Occupation Certificate (OC) in January 2017. Upon inspection of the Garden by the 1st Defendant, the 1st Defendant issued a letter dated 17.05.2017 ("the said Letter") stating a condition as follows:

"Sebelum Majlis dapat memberi pertimbangan ke atas permohonan pengeluaran Sijil Menduduki Bangunan, perkara-perkara berikut hendaklah diselesaikan terlebih dahulu:

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2. Isu jalan masuk/keluar ke kawasan tapak pembangunan tuan hendaklah diselesaikan dengan pemaju Unsur Pancar Sdn. Bhd."

The Plaintiff alleged that it is suffering continuing loss and damages escalating to the sums of millions being contractual liquidated damages due to the purchasers and maintenance costs for the building, and further, since the Certificate of Practical Completion had been issued, the purchasers are obliged to make higher amounts of monthly instalments for payment of housing loan whilst being denied the enjoyment of their homes.

GRACE CHAW

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The Plaintiff commence this action against the 1st Defendant for, inter alia, a declaration that Item 2 of the said Letter be struck out and for an order for issuance of OC as well as damages and interest. The Plaintiff is also claiming against the 2nd Defendant for declaration as to the rights to use the road reserve, an order to restrain obstruction or to remove the obstruction to use of the road reserve as well as damages and interest.

Submission of the 1st Defendant

It is submitted for the 1st Defendant that the declaration sought by the Plaintiff is in fact and substance in the form of an order of certiorari seeking to quash the 1st Defendant's decision/condition in item 2 of the said Letter and the order sought to compel the 1st Defendant to issue OC to the Plaintiff's project development, i.e. the Gardens is in fact and substance in the form of an order of mandamus. It is contended that the Plaintiff's complaints contain substantial elements of public law and the Plaintiff's application in the mode of the Originating Summons is an abuse of the process of the Court by circumventing the mandatory provisions of Order 53 of the [Rules of Court 2012](#) which sets out a specific procedure for an aggrieved party seeking relief against the public authority concerning an infringed right under public law.

Submission of the Plaintiff

The learned counsel for the Plaintiff argued that the Plaintiff's claim against the 1st Defendant relates solely on an item in the said Letter issued by the 1st Defendant which involved no element of public law and was not an exercise of statutory power. According to the Plaintiff, item 2 was introduced through the said Letter of which was issued 4 years after the 1st Defendant had approved the Plaintiff's Development Plan on 27.05.2013 and 6 months after the Certificate of Practical Completion issued in November 2016. It is contended that the said item 2 has the effect of infringing upon the Plaintiff's private, commercial and contractual rights to the extent that Plaintiff is unable to deliver vacant possession of the parcels to the purchasers.

It is further submitted that the Plaintiff's claim involved the 2nd Defendant which is a private company and deals with infringement of the Plaintiff's private right to use road reserve and this Court has jurisdiction to hear the Plaintiff's Originating Summons filed on urgent basis and is necessary for a swift and simple disposal of the present matter as the facts are largely undisputed.

Decision

The Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [\[2010\] 3 MLJ 145](#) at paragraph [61] states:

"[61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed."

The Court of Appeal in *Shahizul Helmi Sharani @ Rohan v. Angkatan Tentera Malaysia & Ors* [\[2017\] 4 MLRA 670](#) applied the Federal Court decision of **Ahmad Jefri** and re-affirmed the following principles:

- (1) where a claim is based solely on an alleged breach of public law rights, it must be made by way of judicial review;

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- (2) it would be an abuse of the Court's process to bring an action by way of an ordinary civil action having regard to the procedural and other hurdles that would apply exclusively to applications for judicial review; and
- (3) there are, however, exceptions such as:-
 - (a) where a plaintiff had a contractual relationship with a public authority;
 - (b) where a civil right to debt payable arising out of a statutory scheme; and
 - (c) where it involves native customary rights related claims which are not solely and/or exclusively within the domain of public law.

It is not disputed that the 1st Defendant is a statutory body and a public authority. The Plaintiff however argues that the introduction of item 2 by the 1st Defendant is not a decision in the exercise of statutory power. The Plaintiff contends that the nature of the act in introducing item 2 in the said Letter does not arise from an obligation under public law and does not have sufficient public law elements in the decision made.

The Plaintiff at paragraph 2 of its Statement (Encl.6) recognizes that the 1st Defendant is a District Council established under the Penampang District Council Instrument, 1961 issued under the Local Government Ordinance, 1961 and the 1st Defendant is authorized in Sabah to approve development and building plans for the District of Penampang and the Appropriate Authority to issue Occupation Certificate.

Having accepted that the 1st Defendant is a statutory and a public authority, the next question is whether the 1st Defendant is entrusted by public law with discharging and the enforcement of public duties as a public authority.

Section 4A of the *Town and Country Planning Ordinance* (Cap. 141) "the Ordinance") states as follows:

"Every Local Authority shall be the local planning authority for the area of the Local Authority"

[Section 48 \(1\)](#) of the Ordinance states as follows:

"(1) The functions of the Local Authority as a local planning authority shall be (a) to regulate, control and plan the development of all lands and buildings within its area; (b) to undertake, assist in, and encourage the collection, maintenance, and publication of statistics, bulletins, and monographs, and other publications relating to town and country planning and its methodology; and (c) to perform such other functions as the Central Board may from time to time assign;

(2) A Local Authority may perform any other functions that are supplemental, incidental or consequential to any of the functions specified in subsection (1) and do all such things as may be necessary or expedient for carrying out its functions under this Ordinance."

[Section 2](#) of the Ordinance defines development as follows:

"development' means the carrying out of any buildings, engineering, mining, industrial or other similar operation, oh, over, or under land, the making of any material change in the case of any land or building or any part thereof or the subdivision or amalgamation of lands; and "building" means any building, erection, structure or any other building erected on or made on any lands and where the context so permits, includes the land on which the building is situate.

[Section 2](#) of Cap. 141 also defines "Local Authority" to mean "local authority" as defined in section 2 of the Interpretation Ordinance.

Section 3 (1) of the Interpretation and General Clauses Enactment 1963 (Sabah 34 of 1963) defines "local authority" to mean:

"An Authority established under the Local Government Ordinance (111961) and, when no such Authority has been so

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established in respect of an area, the District Officer of the district in which such area is situate."

Similarly, Ordinance (No. 11 of 1961) states as follows:

"The instrument shall provide that subject to the provisions of any written law and subject to limitations and conditions as may be specified therein, an Authority either shall perform or may perform all or any of the following functions in respect of all or any part of its area:

(23) regulate and control all buildings and building operations and the repair and removal of ruinous and dangerous buildings and subject to any written law relating to town planning, prohibit the erection of a building of a particular class, design or appearance in particular districts localities or streets or portions of streets;

(34) provide for the preparation, undertaking and control of schemes for improved housing layout and settlement"

As submitted by the learned counsel for the 1st Defendant, considering the totality of the effect of the above statutory provisions, it is quite clear and unarguable that part of the Local Authority's functions are, inter alia:

- (1) to regulate, control and plan the development of all lands and buildings within its area including providing for the preparation, undertaking and control of schemes for improved housing layout and settlement; and
- (2) to perform:
 - (a) such other functions as the Central Board may from time to time assign to the 1st Defendant as the Local Authority pursuant to the provisions of the Town and Country Planning Ordinance (Cap. 141); and
 - (b) such other functions that are supplemental, incidental or consequential to any of the functions authorized to the 1st Defendant under the provisions Cap. 141 and do all such things as may be necessary or expedient for carrying out its functions under Cap. 141.

In the premises, clearly, it is unarguable that the 1st Defendant as the Local Authority was and is entrusted with the discharge of public functions under public law elements relating to the development of all lands and buildings within its area of jurisdiction.

In this Originating Summons, the Plaintiff seeks against the 1st Defendant, inter alia, a declaration that item 2 of the said letter, namely, "*Isu jalan masuk/keluar ke kawasan tapak pembangunan tuan hendaklah diselesaikan dengan pemaju Unsur Pancar Sdn. Bhd*" is onerous, arbitrary and not part of the Approved / Revised Development Plan and hence invalid null and void and to be struck off and for an Order that the 1st Defendant issue the OC to the Plaintiffs development known as the Garden within one week from the date of the Order of the High Court.

By seeking the said declaration, the Plaintiff is in fact challenging the jurisdiction or statutory powers of the 1st Defendant as a statutory or Public Local Authority with public law functions. The Plaintiff's allegations that the 1st Defendant's refusal to issue OC to the Plaintiff as onerous or arbitrary call for an examination of the jurisdictional or statutory limits of the 1st Defendant's statutory powers as the public authority authorized by public law to regulate, control, plan and approve development and building plans for the District of Penampang and to issue OC.

I agree with counsel for the 1st Defendant that the statutory and public functions of the 1st Defendant in the regulation, control, planning and approval of any commercial residential development such as the Garden development project in the instant case must take into account not just the Plaintiff's right as a developer but the wider public law and public interest of adjoining land owners such as the 2nd Defendant including but not limited to the public interest of the purchasers of such commercial residential development in that all development plans etc submitted by the Plaintiff as approved by the 1st Defendant must be strictly adhered to.

Therefore, with respect, it is incorrect for the Plaintiff to say that item 2 of the said Letter which the Plaintiff alleged to have the effect of infringing upon the Plaintiff's private, commercial and contractual rights to the extent that Plaintiff is unable to deliver vacant possession of the parcels to the purchasers, is devoid of public law element.

The Plaintiff further argued that the Plaintiff's Originating Summons was also commenced against the 2nd

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Defendant which is not a public authority and hence not suitable for judicial review. In support the Plaintiff cited *Gan Chong Guan Transport Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors* [2012] 4 MLJ 799, where the Court of Appeal held:

“Only if a dispute had substantive principles of public law was O 53 of the RHC, the appropriate procedure. The claim, which was based on breach of duty and or negligence, was more fact-based than anything else. In the instant case, it was not only against public authorities but was also against a defendant (‘the fifth respondent’) who was licensed to examine and inspect the said vehicle on behalf of the first and second respondents, and who was allegedly negligent in the examination and inspection of the said vehicle. There was also another defendant (‘the sixth respondent’) who was not a public authority. The court was of the view that the dispute was not suitable for judicial review. The prayers for the declaration and the mandatory order should not have been struck out on the ground of non-compliance with O 53.”

As submitted by the 1st Defendant’s counsel, the fact that the other defendant in a dispute is not a public authority does not automatically render a dispute unsuitable for judicial review. The qualification for a dispute to be suitable for judicial review as pointed out in **Gan Chong Guan Transport Sdn Bhd** is that the dispute has substantive principles of public law.

I have already held above it is indisputable that such development by the Plaintiff is subject to Town and Country Planning laws which involves public law elements. The Plaintiff purported cause of action against the 1st Defendant is not grounded on the law of contract nor is it a tortious action. The Plaintiff is also not suing the 1st Defendant for negligence nor for any infringement of the Plaintiff alleged private rights which are not associated with planning laws.

In essence, the Plaintiff’s claim against the 1st Defendant is solely on item 2 in the said Letter whilst the Plaintiff’s main contention against the 2nd Defendant relates to the Plaintiff’s right to use the road reserve as access. There is no connection between the 1st Defendant and the 2nd Defendant. The respective reliefs sought by the Plaintiff against the 1st and 2nd Defendants are mutually distinct and exclusive. The Plaintiff is simply adding the 2nd Defendant in the Originating Summons to circumvent the mandatory requirements of Order 53 of the *Rules of Court, 2012*.

Even if it can be said that there is a mixture of public and private law, for reasons above stated, I am of the view that public law is more predominant in this dispute.

In *Ace Polymers (M) Sdn Bhd v. Ketua Pengarah Lembaga Kemajuan Ikan Malaysia & Ors* [2012] 8 CLJ 440 HC at page 449, Mary Lim J has this to say:

“[22] Even if it can be said that there is a mixture of public and private law in this case, it is my judgment that the plaintiffs complaints necessarily contain substantial elements of public law. It is difficult to see from the nature of the plaintiffs complaints how these complaints can be matters or issues concerning private law. The claim therefore falls squarely within the category of cases that must be brought by way of judicial review.

[23] This is also not a matter of the plaintiffs choice. It is not up to the plaintiff to decide how it wants to challenge the defendants in this regard. These are matters of public law where specific procedure has been prescribed for such challenges. This rule must be adhered to strictly as it “is in the interest of good administration”.

The Plaintiff has also submitted that the Originating Summons falls within the jurisdiction of this Court as the urgency of the Plaintiff’s claim requires a swift and simple disposal of the matter by way of Originating Summons to seek declaratory reliefs and orders as permitted under Order 15 rule 16 *Rules of Court 2012* and relevant provisions of the Specific Relief Act 1950 including *s. 41, 42 and 44* of the *Specific Relief Act 1950*. With respect, I am unable to agree.

In **Ahmad Jefri James Foong FCJ** at page 172, paragraph [60] held:

“However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follows. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for

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such relief must commence according to what is set down in O 53 of the [RHC](#) otherwise it would be liable to be struck off for abusing the process of the court"

The Plaintiff's claim for infringement of its rights by the 1st Defendant is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. The Plaintiff's application in the mode of the Originating Summons as in Enclosure 1 is an abuse of the process of the Court by circumventing the mandatory provisions of Order 53 of the [Rules of Court 2012](#) which sets out a specific procedure for an aggrieved party seeking relief against the public authority concerning an infringed right under public law.

Enclosure 10 is allowed. Enclosure 1 is dismissed. The 1st Defendant is seeking 2 sets of costs, i.e., for getting-up costs and outlays of the application in connection with Enclosure 10 and getting-up costs and outlays for defending the Plaintiffs Originating Summons.

I allow cost of RM3,000.00 for Enclosure 10 and costs of RM2,000.00 for Enclosure. 1 to the 1st Defendant.

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