



DATO' KHOO CHEE HIONG & ANOR v TH LADANG (SABAH & SARAWAK) SDN BHD & ANOR

[CaseAnalysis](#)

[2022] MLJU 2993

[Dato' Khoo Chee Hiong & Anor v TH Ladang \(Sabah & Sarawak\) Sdn Bhd & Anor \[2022\] MLJU 2993](#)

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ADLIN ABDUL MAJID JC

ORIGINATING SUMMONS NO WA-24NCC-110-02 OF 2022

29 November 2022

Malik Imtiaz Sarwar (with S Kanaga Sundran, Wong Ming Yen and Nur Syahirah Mohd Fauzi) (Raja Seelan & Assoc) for the plaintiffs.

Farah Shuhadah Razali (with Ng Ying Ci) (Zul Rafique & Partners) for the defendants.

Adlin Abdul Majid JC:

JUDGMENT

A. Introduction

[1] This case involves the proposed sale of shares owned by the 1st defendant, to the plaintiffs. Negotiations fell through, and the sale of shares did not materialise. The plaintiffs filed an originating summons, seeking a refund of the earnest deposit they had paid to the 1st defendant pursuant to the letter of offer entered into between the parties.

[2] I dismissed the originating summons. I found that the 1st defendant was entitled to retain the deposit, as the letter of offer expressly provides that the deposit is non-refundable.

B. Background Facts

[3] By a letter of offer dated 18 April 2019 ("Letter of Offer"), the 1st defendant offered to sell 9,044,484 ordinary shares ("Shares") held by the 1st defendant in Ladang Jati Keningau Sdn Bhd ("LJK"), to the plaintiffs or their corporate vehicles. The Shares represent approximately 82.53% of the shareholding of the 1st defendant in LJK.

[4] The Letter of Offer provides that the total consideration for the Shares is RM38,000,000, comprising the following:

- a. Purchase consideration for the Shares, in the sum of RM29,251,481 ("Purchase Consideration"); and
- b. Settlement of shareholders' advances by the 1st defendant to LJK, in the sum of RM8,748,519.

[5] The Purchase Consideration is required to be paid by the plaintiffs (referred to as "Purchasers" in the Letter of Offer) to the 1st defendant (referred to as "Vendor" in the Letter of Offer) in accordance with clause 5 of the Letter of Offer.

[6] Clause 5 provides as follows:

*“(a) A non-refundable earnest deposit amounting to **Ringgit Malaysia One Million One Hundred Forty Thousand (RM1,140,000.00)** only (“**Earnest Deposit**”) shall be payable by the Purchasers to the Vendor upon the acceptance of this Letter of Offer and not later than seven (7) days from the date of acceptance of this Letter of Offer.*

*“(b) The balance deposit amounting to Ringgit Malaysia **Two Million Six Hundred Sixty Thousand (RM2,660,000.00)** only (“**Balance Deposit**”) shall be payable by the Purchasers to the Vendor upon execution of the Share Sale Agreement (as defined below).*

*“(c) The balance Purchase Consideration amounting to **Ringgit Malaysia Twenty Five Million Four Hundred Fifty One Thousand Four Hundred Eighty One (RM25,451,481.00)** only (“**Balance Purchase Consideration**”) shall be paid by the Purchasers to the Vendor on or before the Completion Date.”*

[7] It is undisputed that the Earnest Deposit, as defined in the Letter of Offer, was paid to the 1st defendant on 2 May 2019.

[8] The Letter of Offer requires the plaintiffs and the 1st defendant to enter into a share sale agreement within 30 days from the date of the Letter of Offer, or such other extended date as may be mutually agreed between the parties.

[9] However, negotiations broke down, and the purchase of the Shares was not completed. The plaintiffs argued that negotiations fell through because of the unconscionable conduct of the defendants. The 2nd defendant, who owns the 1st defendant, was also involved in the negotiations.

[10] The 1st defendant forfeited the Earnest Deposit, and as such, the plaintiffs filed this action, seeking a declaration that the defendants were not entitled to forfeit the Earnest Deposit, and an order that the 1st defendant pays the Earnest Deposit to the plaintiffs.

C. Assessment and Findings

Issue To Be Determined

[11] The main issue for the court's determination is whether the 1st defendant is entitled to retain the Earnest Deposit.

Is The Letter Of Offer Binding On The Parties?

[12] The issue of 1st defendant's entitlement to the Earnest Deposit must be determined by considering the provisions of the Letter of Offer. Therefore, the question that must be answered first is whether the Letter of Offer is binding on the parties.

[13] The plaintiffs argued that the Letter of Offer is an agreement to agree, and is not binding on the parties. The plaintiffs referred to clause 9 of the Letter of Offer, which states:

*“The Vendor and the Purchasers shall enter into a binding share sale agreement (“**Share Sale Agreement**”) within thirty (30) days from the date of this Letter of Offer or such other extended date as may be mutually agreed between the Parties on the terms and conditions set out in this Letter of Offer and subject to such other terms and conditions as may be acceptable to the Vendor under the Share Sale Agreement.”*

[14] The argument put forward by the plaintiffs, taking into account the above provision, is that the Letter of Offer is still subject to terms and conditions under the share sale agreement that is due to be executed. As such, the Letter of Offer is not binding on the parties.

[15] I am unable to agree with this argument, for two main reasons. The first is that the Letter of Offer must be considered holistically, and when taking a holistic approach in considering the Letter of Offer, what is apparent is that essential terms of the agreement between the parties had been agreed to.

[16] In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, the Federal Court held as follows:

*“... An agreement to make an agreement does not result in a contract. **It is for the court in each case to construe the***

correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

Unless the approach we have stated is adopted, a party to a contract who - after having concluded his bargain - entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. *Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.*

The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 where he said:

*Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, **the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat.** That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."*

(emphasis added)

[17] Having considered the relevant documents, the court in **Charles Grenier** held that it was unable to find that there is no concluded contract between the parties until a formal sale and purchase agreement had been executed. This is because essential terms, namely the parties to the contract, the property and the price of the property had been identified with sufficient clarity.

[18] In this case, the following essential terms had been agreed to in the Letter of Offer:

- a. The parties, with the 1st defendant named as the Vendor and the plaintiffs as the Purchasers;
- b. The subject matter of the transaction, namely the Shares, identified in the Letter of Offer as 9,044,484 ordinary shares held by the 1st defendant in LJK.
- c. The price of the Shares, which was set at RM38,000,000. The parties agreed that this price comprises the Purchase Consideration of RM29,251,481 and settlement of shareholders' advances by the 1st defendant to LJK, in the sum of RM8,748,519.
- d. Payment terms for the Purchase Consideration and timelines for payments to be made, namely:
 - i. The Earnest Deposit amounting to RM1,140,000, to be paid upon acceptance of the Letter of Offer and no later than seven days from the date of acceptance of the Letter of Offer;
 - ii. The balance deposit amounting to RM2,660,000, to be paid upon execution of the share sale agreement; and
 - iii. The balance Purchase Consideration amounting to RM25,451,481, to be paid on or before the Completion Date.
- e. The Completion Date is defined in the Letter of Offer as the business day falling seven days after fulfilment of the Conditions Precedent (as defined in the Letter of Offer).
- f. The Conditions Precedent for the sale of the Shares include approvals of government and regulatory bodies, directors and shareholders, and the completion of a financial due diligence on LJK.

[19] With such extensive terms provided for in the Letter of Offer, I find it to have been more probable than not that the intention of parties at the time of the signing of the Letter of Offer, was to be bound by the Letter of Offer.

[20] Further, guided by *Syarikat Pertanian Emmal Sdn Bhd v Tractors Malaysia (1982) Sdn Bhd* [2009] 4 MLJ 223 and *Syarikat Desa Permai Sdn Bhd v Melor Screenvision (M) Sdn Bhd* [1993] MLJU 382, I find the unqualified

payment of the Earnest Deposit by the plaintiffs pursuant to the Letter of Offer strengthens the defendants' case, that the intention of the parties was for the Letter of Offer to be legally binding.

[21] I move on to the second reason for my rejection of the plaintiffs' argument that the Letter of Offer does not bind the parties. In my view, it is clear that the acceptance of the Letter of Offer and the payment of the Earnest Deposit are not subject to any terms or conditions.

[22] The plaintiffs argued that clause 9 of the Letter of Offer provides that the share sale agreement shall be entered into:

*"... on the terms and conditions set out in this Letter of Offer and **subject to such other terms and conditions** as may be acceptable to the Vendor under the Share Sale Agreement."*

(emphasis added)

[23] The plaintiffs claimed that as the Letter of Offer is still subject to terms and conditions under the share sale agreement, the Letter of Offer is not binding on the parties.

[24] It is my view that the reference to "such other terms and conditions" in the above provision merely means that other additional terms may be agreed to in the course of negotiations, as is common in a transaction of this nature. The reference does not point to the intention that the Letter of Offer would not be binding until the share sale agreement is executed.

[25] The plaintiffs referred to *Ayer Itam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, where the Supreme Court found that there was no concluded contract between the parties. However, the document in *Ayer Itam* is a letter of intent, which did not set out several essential matters. The content of the letter of intent in *Ayer Itam* is substantially different from the Letter of Offer in this present case. The letter of intent contained basic terms, with no actual price, payment schedule or other essential terms set out. The Letter of Offer in this case, on the other hand, had set out the essential terms of the agreement between the parties. This points to the intention of the parties for the Letter of Offer to be binding.

[26] The Supreme Court in *Ayer Itam* held that:

*"In **Smith v Hughes** 1 it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement **the parties must be ad idem, ie there must be a consensus between them.***

*But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? **The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.***

In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

(emphasis added)

[27] In the present case, with the essential terms expected for a sale of shares, i.e. the price, the terms of payment and the conditions precedent to the sale, having been set out in the Letter of Offer, and with payment of the Earnest having been made, I find the intention of the parties would have been for the Letter of Offer to be binding.

Is The 1st Defendant Entitled To Retain The Earnest Deposit?

[28] With the finding that the Letter of Offer is binding on the parties, I then considered the provision on the payment of the Earnest Deposit in clause 5(a) of the Letter of Offer.

[29] Clause 5(a) provides as follows:

*"A non-refundable earnest deposit amounting to **Ringgit Malaysia One Million One Hundred Forty Thousand***

(RM1,140,000.00) only (“Earnest Deposit”) shall be payable by the Purchasers to the Vendor upon the acceptance of this Letter of Offer and not later than seven (7) days from the date of acceptance of this Letter of Offer.”

[30] The meaning of “non-refundable” Earnest Deposit is plain and unambiguous and gives rise to the clear intention of the parties, that the Earnest Deposit is not refundable.

[31] The courts will give effect to the plain and unambiguous meaning of the contractual terms expressed by parties, and will give words in a contract their natural and ordinary meaning (see *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464).

[32] In this present case, the natural and ordinary meaning of the words “non-refundable earnest deposit” in clause 5(a) of the Letter of Offer leaves me with no doubt that the intention of the parties at the material time was that the Earnest Deposit is to be non-refundable. As such, I am obliged to give effect to this intention.

[33] The interpretation of clause 5(a) is also in line with common business sense, as the cost of entering into the Letter of Offer would be to deprive the 1st defendant from selling the Shares to other parties.

[34] The plaintiffs’ argument that the 1st defendant is not entitled to retain the Earnest Deposit is firstly premised on the contention that the Letter of Offer is not binding on the parties. Relying on *Skyline Trading Co v Tiow Yoke Lan* [1969] 2 MLJ 212, the plaintiffs argued that the basis of the payment of the Earnest Deposit, namely the execution of the share sale agreement, had not been met, and as such, the plaintiffs were entitled to have the Earnest Deposit returned.

[35] I have found the Letter of Offer to be binding, which consequently means that the plaintiffs’ argument on the return of the deposit must fail. Further, I find the plaintiffs’ reliance on *Skyline Trading* to be misconceived, as the case involves a letter of intent that provides for the payment of a booking fee which was to form part of the purchase price. There is no express statement that the booking fee is non-refundable. In the present case, the nature of the Earnest Deposit being non-refundable is expressly set out in the Letter of Offer.

[36] The second contention raised by the plaintiffs is the unconscionable conduct of the defendants, which the plaintiffs claimed was intended to frustrate negotiations. As such, it is the plaintiffs’ case that it is unconscionable for the 1st defendant to forfeit the Earnest Deposit. From the evidence before this court, I could not find any unreasonable or unconscionable conduct of either party in the course of negotiations. Rather, it was the relatively short timeline of 30 days for the execution of the share sale agreement, imposed in the Letter of Offer, that had led to short deadlines being imposed for both sides to revert on comments to the agreement.

[37] Further and in any event, the express provision of clause 5(a) of the Letter of Offer is clear and unambiguous, that the Earnest Deposit is non-refundable. The court must therefore give effect to this provision.

D. Decision

[38] On the basis of my finding that the Letter of Offer is binding on the parties, and that the Earnest Deposit is non-refundable, it is my considered view that the 1st defendant was entitled to retain the Earnest Deposit. Thus, I dismissed the originating summons, with costs.