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Right to Terminate: When Opposing Side Has Not Only Broken the Contract, But Also Refuses to Perform

The dispute

In *Menara Jutamas Sdn Bhd*,¹ the plaintiffs entered into a contract to purchase land from the first defendant. The second defendant agreed to, among others, guarantee the first defendant's due performance and compliance of the terms and conditions under the sale.

The agreement was subject to two conditions precedent — the first plaintiff was to apply for and obtain approval from the Economic Planning Unit (if applicable) and the first defendant was to apply for and obtain State Authority Approval, both within an agreed deadline. It was also agreed that unless the conditions precedent were waived, the parties had the right to terminate the agreement if the conditions precedent were not met on the deadline. The parties also agreed that time was of the essence and the agreement contained a non-waiver clause.

The first defendant did not apply for and obtain the required State Authority Approval before the deadline. The first plaintiff did not, however, elect to immediately terminate the agreement after the deadline but continued to enquire on the status of the State Authority Approval.

The defendants, after the deadline, sought and obtained a blanket consent from the Selangor State Director of Land and Mines and regarded all conditions precedent under the agreement as having been fulfilled. The first plaintiff disagreed.

The first plaintiff's solicitors issued a notice to terminate the agreement after the defendants showed no intention of applying for State Authority Approval. After the termination, the defendants then obtained the State Authority Approval and challenged the termination. The High Court and the Court of Appeal later found that the blanket consent was not the required State Authority Approval.

Despite rejecting the termination, the first defendant later forfeited the deposit and, less than a month after termination, entered into another agreement to sell the lands to another party. The plaintiffs sued for, among others, specific performance.

However, due to the subsequent sale, the plaintiffs at trial confined the claim to refund of the deposit and damages.

First instance

The High Court dismissed the plaintiffs' claim. The High Court held that, since time was of the essence, time for performance of the conditions precedent under the agreement was at large. The first plaintiff was obliged to give reasonable notice to the first defendant before the first plaintiff could issue notice to terminate.

On appeal

The Court of Appeal did not agree and held that the defendants through their correspondences "*had clearly taken a stand*" that they had already fulfilled their obligations by obtaining the blanket consent and they would not apply for the correct State Authority Approval. The Court of Appeal noted that failure to obtain the approval would have rendered the agreement void. The court also noted that, despite contending they had obtained the State Authority Approval, the defendants forfeited the deposit and sold the lands to another party.

The Court of Appeal, in coming to its decision, referred to the Federal Court's decision in *Sime Hok*,² where Jeffrey Tan FCJ said:

"[38] The final observation we wish to impart is that "Notice is not necessary if a party delays performance for so long and in such circumstances, as to amount to a repudiation of the contract. The only legitimate inference may be that he or she is saying, '**Not only have I broken my contract by not doing the thing on the due day, but I am not going to do the thing at all**' or '**I am not going to do the thing at all unless and until I find it convenient to do it**.'" (*Cheshire & Fifoot's Law of Contract* 6th Australian Ed. at p 742)." [Emphasis added.]

The Court of Appeal also referred to the following passage of Lord Shaw's judgment in *Forslind*,³ which was also referred to in *Sime Hok*:

"If, in short, A, a party to a contract, acts in such a fashion of ignoring or not complying with his obligations under it, B, the other party, is entitled to say: 'My rights under this contract are being completely ignored and my interests may suffer by non-performance by A of his obligations, and that to such a fundamental and essential extent that I declare he is treating me as if no contract existed which bound him.'..."

The principles in *Sime Hok* are not new. In *Rasih Munusamy*, the (then) Supreme Court held:⁴

"... If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not to treat himself as discharged."

The Court of Appeal, relying on principles in *Sime Hok*, held that the first plaintiff was entitled to issue the notice of termination. Abdul Karim

² *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149
³ *Forslind v Bechley-Crundall* [1922] SC (HL) 173
⁴ *Rasih Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, at p 294

JCA said the High Court had erred in holding that reasonable notice needs to be given because “*the defendants’ stance amounts to a repudiation of contract*” and “*due to the repudiation by the defendants*”, the “*plaintiffs were not required to give reasonable notice to the defendants*”.

The Court of Appeal, in coming to its decision, was obviously guided by Brennan J’s judgment in *Laurinda*,⁵ which was referred to in *Sime Hok*, where his Lordship said:

“Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party’s inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.”

Before the Federal Court

The defendants sought leave to appeal to the Federal Court. Among others, leave to appeal was sought on the issue where time is not of the essence and no time for performance is specified, whether reasonable notice to perform needs to be given before a right of rescission, in view of ss 47 and 56(2) of the Contracts Act 1950. Sections 47 and 56 concern time for performance of a contractual promise.

On 17 June 2021, the Federal Court declined to grant leave because the threshold requirements under s 96(a) of the Courts of Judicature Act 1964 were not met. The Federal Court found the questions posed to be fact sensitive and whether reasonable notice needs to be given depends on the facts of each case.

Andrew Chiew Ean Vooi and **Wong Han Wey** of [Lee Hishammudin Allen & Gledhill](#) acted for the plaintiffs/respondents in the Federal Court. Our late partner, **Ang Hean Leng**, was counsel for the plaintiffs in the courts below.

The Court of Appeal’s grounds of judgment may be viewed [here](#).

If you have any queries, please contact associate Wong Han Wey (whw@lh-ag.com) or team partner [Andrew Chiew Ean Vooi](#) (ac@lh-ag.com).

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