HARAZ INDUSTRIAL SDN BHD **... 1st Appellant**
YAU WEE WOON **... 2nd Appellant**
WU CHAY CHIN **... 3rd Appellant**

AND

LEE FATT KHONG **... Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 11 of 2015)

Before: Mortimer P, Burrell and Seagroatt JJ A.
12th May 2016

Heading – Application for summary possession of land pursuant order 88 rule 1 – Applicable test – whether interlocutory or final order – S.20(2)(f) CAP 5 – When leave to appeal to Court of Appeal should be granted.

Mr. Mohd Noorsuhaimy bin Haji Kasmany (M/S Pengiran Izad and Lee) for Appellants
Mr. Mohd Shazale bin Haji Mat Salleh (M/S Mohd. Shazale Salleh, Advocates and Solicitors) and Mr. Zamri bin Haji Mohammad Taha (M/S Zamri Taha Associates) for Respondent

Cases cited in the judgment

Bozson v Altrincham UDC [1903] 1 KB 547
YKH Trading PTE Ltd v Schneider Singapore (Sales and Engineering) PTE Ltd (C.A 3/1999)
Ltd v Hyundai Engineering Co. Ltd (CA 3/2001)
(Smith v Cosworth Casting Processes [1997] (WLR 1538)
Morsima Sdn Bhd and Wong Yep Meng v Perbadanan Tabung Amanah Islam Brunei (2008 BLR Vol. III)

Burrell, JA.:

The background to this appeal was succinctly outlined by Steven Chong J when handing down his decision on the Appellant's application for summary possession of land pursuant to RSC order 88 r.l on 22 October 2015, in the following way.

> *"By a Sale and Purchase Agreement ("the SPA") dated 31 October 2005 made between the Defendant and the late Lee Fatt Shoon (the Defendant's brother) as the vendors and the 1st Plaintiff ("Haraz Industrial Sdn Bhd") as the purchaser, Haraz Industrial Sdn Bhd agreed to purchase a lease of 90 years of the land at the purchase price of $350,000.*

The land was registered in the names of the Defendant and the late Lee Fatt Shoon but charged to the Hongkong and Shanghai Banking Corporation Limited ("HSBC") to secure a loan granted to Castle Trading Company. In the SPA it was agreed that Haraz Industrial Sdn Bhd would provide alternative security to HSBC for the loan granted to Castle Trading Company.

Subsequently, on 4 October 2006, by a Deed of Varation ("the DOV") made between the vendors, Haraz Industrial Sdn Bhd and the 2nd and 3rd Plaintiffs ("Yau Wee Woon and Wu Chay Chin"), the terms and conditions of the SPA were varied.

In the DOV, it was agreed that upon execution of the deed, Yau Wee Woon and Wu Chay Chin shall: (i) proceed, with the vendors, to discharge the charge on the land to HSBC; and (ii) pay the vendors the sum of $350,000 as the purchase price of the land."

Relying on the signed SPA, the signed DOV and a signed payment voucher the plaintiffs applied for a summary possession order.

The learned judge's decision was that:

"On the affidavits, I am not satisfied that the Plaintiff's have proven the Defendant received payment and they are entitled to possession of the land.

I think this matter begun by originating summons should be continued as if the matter had been begun by writ and I so order under RSC o.28 r.8."

The Appellants now contend that the judge's decision was wrong on the following grounds:

"3.1 the Honourable Judge erred in law and in fact when the Honourable Judge dismissed the Appellants application for summary possession of land against the Respondent.

3.2 that the Honourable Judge erred in law and in fact when the Honourable Judge opined and ruled that there is a conflicting evidence on issue of payment of the purchase price for the property.

3.3 that the Honourable Judge erred in law and in fact that the documentary evidence produced by the Appellants was inconclusive as to the payment of the purchase price for the property by the Appellants to the Respondent.

3.4 that the Honourable Judge erred in law and in fact when the Honourable Judge had not taken into consideration the payment voucher signed by the Defendant and one Lee Fatt Shoon as proof of payment of the purchase price of the property.

3.5 the Honourable Judge erred in law and in fact when the Honourable Judge accepted as evidence a letter dated 30th November 2012 from the Respondent's late brother which amounted to hearsay."

Grounds 3.1 to 3.4 all amount to the same thing, namely that the judge was wrong to conclude that the affidavit evidence was either conflicting or inconclusive on crucial issues in the dispute between the parties.

Having considered the judge's written decision, the affidavit evidence and the written and oral decisions of both parties this court is in complete agreement with the judge's reasons which were clearly and succinctly given.

It is trite law that a court will refuse summary judgment if there are triable issues and/or the Defendant can show an arguable case and therefore it is not appropriate to be dealt with by affidavit evidence.

The single simple fact which the Plaintiff/Appellant must prove in this case is that the Defendant(s) received the BD$350,000 as the agreed price for the sale of the land. The surviving Defendant has consistently and strenuously denied that he has ever received the money.

The high water mark of the evidence upon which the Appellants rely in support of their contention that the Defendant did in fact receive the money is a copy of a payment voucher, dated 10 May 2006 purportedly signed by the Defendant. The judge correctly observed concerning this crucial document:-

> *"In my opinion, the documentary evidence is inconclusive. The Plaintiffs say that the payment voucher provides clear proof of receipt of payment. But the Defendant has explained the circumstances in which he signed the payment voucher.*
>
> *Benedict Lee played a pivotal role in the sale and purchase of the land between Haraz Industrial Sdn Bhd, of which he was a director at the material time, and the Defendant and Lee Fatt Shoon. This was a transaction between family members. The evidence of Benedict Lee and the Defendant must be assessed in the context of the relationship between them and tested in a trial."*

In our judgment there are a number of important matters which can only safely be resolved after hearing witnesses at trial. As the evidence presently stands it is possible that after trial a judge would find wholly in the Plaintiff's favour. It is equally possible that he would find wholly in the Defendant's favour.

We merely highlight some of the more obvious issues which require further investigation.

(i) Why has the original payment voucher not be shown to the defence? The Plaintiffs are in possession of it. It contains potential irregularities which merit cross-examination.

(ii) Why have the disputed cash cheques not been produced to the defence? Both the cheques and the payment voucher were the subject of a Notice to Produce filed by the Defendant on 15 August 2015. There has been no satisfactory response.

(iii) Moreover, no evidence has been forthcoming from the two banks on which the cash cheques were drawn ($232,000 with Standard Chartered and $78,000 with United Overseas Bank). Such evidence has the potential of proving the case one way or the other.

(iv) Why does the DOV post date the payment voucher and alleged date of handing over the $40,000 cash and two cash cheques by 5 months but nonetheless states that "$350,000 shall be paid as the purchase price…"?

(v) Why does the Originating Summons post date the payment voucher by over 8 years?

We shall resist the temptation to analyse further the current state of the evidence. The contention that this matter should go to trial is overwhelming.

Ground 3.5 of the Notice of Appeal is equally lacking in merit. It states that the judge "accepted as evidence" a letter which was said to be hearsay. He did not. He merely referred to it when outlining the defence case which he did succinctly and fairly in the same way as he outlined the Plaintiff's case. There is no other reference to it in the judgment. Its admissability as evidence will be a matter for the trial judge. It is not for this court to rule on its admissability either.

S.20 Supreme Court Act CAP 5

Having now dismissed the Appellant's appeal on its merits we turn to a procedural matter raised by the Respondent. It is submitted that, in any event, this appeal should be dismissed pursuant to s.20(2)(f) of CAP 5 which states that no appeal shall lie to the Court of Appeal:-

> *"(f) without leave of the High Court of Court of Appeal, from any interlocutory order or judgment"*

It is contended that Steven Chong J's decision was interlocutory in nature and as no leave has either been sought or granted then no appeal shall lie.

The test to be applied to determine whether or not a matter is interlocutory or final was originally formulated in *Bozson v Altrincham UDC [1903] 1 KB 547* and reiterated in Brunei by Fuad P. in *YKH Trading PTE Ltd v Schneider Singapore (Sales and Engineering) PTE Ltd (C.A 3/1999)* and further approved by Cons J.A in *Rohde Neilsen (HK) Ltd v Hyundai Engineering Co. Ltd (CA 3/2001)*. It is as follows:

> *"Does the judgment or order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."*

Thus the test is not merely the nature of the action but more importantly the effect of the order *"as made."*

In the present case the judge's order was that the summons *"should be continued as if the matter had been begun by writ…"* Plainly it has not *"finally disposed"* of the matter and is therefore an interlocutory order.

Leave to appeal should have been applied for but was not.

The correct procedure for applying for leave is by motion with supporting affidavit to the trial judge or to the Court of Appeal.

This court nonetheless has power to grant leave without strict compliance with the correct procedure even at the eleventh hour in response to an oral application in the course of the appeal itself.

However, whether done correctly or at the last minute, leave will only be granted in certain circumstances. The test is that leave will normally be granted unless the appeal has no realistic prospects of success *(Smith v Cosworth Casting Processes [1997] (WLR 1538)*. In Brunei in *Morsima Sdn Bhd and Wong Yep Meng v Perbadanan Tabung Amanah Islam Brunei (2008 BLR Vol. III)* Davies J.A referred to *"two cumulative tests"* as follows:

> *"The first is whether the decision below is plainly wrong or, at least, attended with sufficient doubt as to warrant it being reconsidered. And the second is whether, if that is so, substantial injustice would result if leave were refused."*

In either event, the application of such tests in the present case is not difficult. Simply put, had leave been sought it would have been refused.

Costs

Having decided (1) that the appeal be dismissed on its merits (2) that leave should have been applied for but was not and (3) that had it been it would have been refused, the costs of the appeal shall be to the Respondent to be taxed if not agreed. It shall be an order nisi.

Order

Appeal dismissed with a costs order nisi in the Respondent's favour to be taxed if not agreed.

Any application concerning costs to be made on or before 18th May 2016 upon notice to the court and the opposing party. Otherwise the costs order will be made final on 19th May 2016.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**