



**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
(BAHAGIAN SIVIL)
[GUAMAN SIVIL NO: 23NCVC-12-2011]**

ANTARA

LIM KIM ONG

... PLAINTIF

DAN

WAWASAN INDERA SDN BHD & 1 LAGI

**... DEFENDAN-
DEFENDAN**

**ALASAN PENGHAKIMAN
OLEH YANG ARIF HAKIM
DATO' TENGKU MAIMUN BINTI TUAN MAT**



The plaintiff filed this suit on 16.8.2011 claiming for damages, as against the 1st defendant for breach of a sale and purchase agreement and as against the 2nd defendant, for breach of duty of care and negligence.

The relevant paragraphs of the statement of claim are reproduced below:-

- “4. Pada semua masa material Defendan Pertama adalah pemaju bagi sebahagian harta tanah yang dikenali sebagai No. Geran bagi Tanah No. 9199 bagi Lot No. 2670 yang berada di Mukim Petaling, Daerah Petaling, Negeri Selangor dan Sijil Hakmilik No. 10940 bagi Lot 3028 yang berada di Mukim Petaling, Daerah Petaling, Negeri Selangor (selepas ini dirujuk sebagai “Harta tanah tersebut”) di mana Harta tanah tersebut akan dimajukan sebagai kawasan perumahan yang dikenali sebagai Pusat Bandar Puchong Fasa 16A.
5. Defendan Kedua pada semua masa yang material mempunyai kuasa perbandaran ke atas kawasan yang diliputi oleh pembangunan itu.
6. Pada atau sekitar 24-11-1997, Plaintiff sebagai pembeli telah melaksanakan (“executed”) suatu Perjanjian Jual Beli dengan Defendan Pertama sebagai penjual (selepas ini dirujuk oleh “Perjanjian tersebut”) di mana Defendan Pertama telah menawarkan untuk menjual dan Plaintiff telah menerima tawaran untuk membeli sebuah rumah berderet dua tingkat untuk balasan sebanyak RM399,000-00 di dalam pembangunan itu ... bersamaan alamat pos No. 44 Jalan Wawasan 4/6, Pusat Bandar Puchong, 47100 Puchong, Selangor Darul Ehsan (selepas ini dirujuk sebagai “Rumah tersebut”). ...



7. Plaintiff telah memasuki perjanjian tersebut atas representasi Defendant Pertama bahawa Defendant Pertama akan membina dan menjual sebuah rumah yang kukuh dan sesuai untuk kediaman.
15. Pada atau sekitar tahun 2007 keutuhan struktur Rumah tersebut telah terjejas. Rumah tersebut tidak boleh didiami dan telah menjadi merbahaya kepada penghuni-penghuni Rumah tersebut serta rumah-rumah bersebelahan. Plaintiff terpaksa merobohkan Rumah tersebut bagi tujuan keselamatan.
17. Pada masa yang sama, Persatuan Penduduk Jalan Wawasan 4 telah membuat aduan kepada Defendant Kedua mengenai masalah keretakan-keretakan tersebut. Defendant Kedua telah melantik Kumpulan Ikram Sdn Bhd (selepas ini dirujuk sebagai “IKRAM”) iaitu suatu badan penyiasat yang bebas bagi mengkaji dan menyiasat punca sebenar keretakan-keretakan tersebut.
18. Selepas Rumah Plaintiff dirobohkan, IKRAM telah menjalankan ujian-ujian di premis tersebut pada atau sekitar pertengahan tahun 2008. Dari ujian-ujian tersebut telah didapati bahawa:-
 - a) “pile cap” yang diguna bagi asas Rumah tersebut tidak menurut spesifikasi;
 - b) kerja-kerja asas (“foundation works”) telah dibuat dan/atau terletak di atas keruntuhan (“debris”) dan bukannya tanah kukuh;
 - c) Terdapat suatu anak sungai di bawah Rumah tersebut serta rumah-rumah bersebelahan. Semua rumah-rumah termasuk Rumah tersebut telah dibina di atas anak sungai yang mana telah menjelaskan struktur dan asas rumah-rumah termasuk Rumah tersebut.



19. Berdasarkan hasil ujian-ujian tersebut, jelas bahawa Defendan Pertama telah gagal melaksanakan kerja-kerja berdasarkan proses-proses kejuruteraan yang nyata (failure to follow due engineering process).”

As against the 2nd defendant, the plaintiff pleads:-

- “25. Pada semua masa material, Defendan Kedua adalah penguatkuasa berkanun bagi kawasan di mana terletaknya Rumah tersebut.
26. Pada semua masa material, Defendan Kedua mempunyai kewajipan berjaga-jaga (“duty of care”) kepada Plaintiff untuk memastikan bahawa pembinaan harta-harta termasuk Rumah tersebut tidak melanggari peruntukan berkanun di bawah Town and Country Planning Act 1976 dan Street, Drainage and Building Act 1974 dan Uniform Building By Laws 1984.
27. Defendan Kedua mempunyai kewajipan *inter-alia* untuk:
 - a) mengambil langkah-langkah bagi menghalang perkara-perkara yang berkemungkinan membahayakan keselamatan awam atau membawa kerosakan harta benda di dalam kawasan penguatkuasaan yang termasuk penyeliaan dan pemeriksaan pengaliran air di kawasan tersebut; dan
 - b) penyeliaan dan kelulusan pelan-pelan bangunan bagi bangunan-bangunan dan struktur-struktur di dalam kawasan tersebut.



BUTIR-BUTIR KECUAIAN

28. Defendan Kedua telah gagal menolak kelulusan bagi pelan-pelan pembangunan yang dibuat oleh Defendan Pertama menurut By-Law 8(3) dan 17 Uniform Building By-Laws 1984 walaupun Rumah tersebut dan rumah-rumah bersebelahan akan dibina di atas anak sungai.
29. Defendan Kedua telah gagal mematuhi Seksyen 53(1) Street, Drainage and Building Act 1974 kerana ia tidak menjaga dan/atau membaiki “watercourses” di bawah kawalannya.
30. Walaupun pembinaan Rumah tersebut tidak mengikuti peruntukan bagi kerja-kerja asas (“foundation”) di bawah By-law 73, Uniform Building By Laws 1984, namun Defendan Kedua telah mengeluarkan Sijil Kesesuaian tersebut.”

Vide paragraph 5 and 6(a) of the statement of defence the 1st defendant's pleads:-

- “5. Perenggan 8 dalam Penyata Tuntutan adalah dinafikan dan Plaintiff diletakkan atas pembuktian kukuh terutamanya mengenai masa apabila keretakan-keretakan pada dinding-dinding Hartanah tersebut muncul dan masa apabila Plaintiff menemui keretakan-keretakan pada dinding-dinding Hartanah tersebut.
6. Berkenaan dengan ini, defendant pertama menegaskan dan akan menegaskan seperti berikut:-
 - (a) aduan-aduan tentang keretakan-keretakan daripada penduduk-penduduk di jalan yang sama seperti Hartanah tersebut iaitu, Jalan Wawasan 4/6, telah dibuat pada atau sekitar 2003 (iaitu 8 tahun sebelum pemfailan tindakan di sini) setelah tamat tempoh waktu liabiliti kerosakan (“defect



liability period”). Oleh itu tuntutan plaintif di sini dihadkan (“barred”) oleh had masa.”

The plaintiff *vide* paragraph 2 of the reply and defence to counterclaim pleads:-

- “2. Perenggan 6 Pernyataan Pembelaan adalah dinafikan secara keseluruhan dan Plaintiff menegaskan seperti berikut:-
- a) Aduan-aduan daripada penduduk-penduduk di Jalan Wawasan 4/6 telah bermula lebih awal daripada 2003. Defendan Pertama telah beberapa kali menjalankan kerja-kerja rektifikasi di kawasan perumahan di Jalan Wawasan 4/6.”

Insofar as the 2nd defendant is concerned, paragraphs 4 and 13 of the statement of defence state:-

- “4. Defendan Kedua menyatakan bahawa Plaintiff tiada kausa tindakan munasabah terhadap Defendan Kedua. Sekiranya ada, Plaintiff telah dihalang oleh had masa di bawah Akta Kerajaan Tempatan 1976, Town and Country Planning Act 1976 dibaca bersama Public Authorities Protection Act 1948.
13. Defendan Kedua memplidkan bahawa Defendan Kedua telah dilindungi imuniti di bawah seksyen 95(2) Akta Jalan, Parit dan Bangunan 1974 sekiranya terdapat kemungkinan kewajipan berjaga-jaga terhadap plaintiff.”

After several case managements, the case was fixed for trial on 7.5.2012, which date was vacated and subsequently fixed on



22nd and 29.6.2012 which dates were also vacated due to the interlocutory applications filed by the defendants.

THE STRIKING OUT APPLICATIONS

On 29.5.2012, the 2nd defendant filed an application to strike out the plaintiff's claim under O. 18 r. 19 (1)(b) or (d) of the Rules of the High Court 1980 (encl 32).

On 7.9.2012, the 1st defendant filed an application under O. 18 r. 19(1)(a) or (b) or (d) of the Rules of Court 2012 to strike out the plaintiff's claim (encl 34).

The common ground for both enclosures 32 and 34 is that the plaintiff's claim is time barred. The 2nd defendant, a local authority raised additional ground ie, that the 2nd defendant is protected under section 95 of the Street Drainage and Building Act 1974 (Act 133).

Learned counsel for the 1st defendant submitted that given the plaintiff's own pleaded case in paragraph 2 of the plaintiff's reply and defence to the counterclaim, the plaintiff's cause of action arose earlier than 2003 and this suit was filed, at the very least, more than two (2) years after the period of limitation has set in. There is, submitted learned counsel, no way that the plaintiff could escape the effect of section 6(1)(a) of the Limitation Act 1953 which provides that an action founded on contract and tort must be



brought within six (6) years from the date on which the cause of action accrued.

For the 2nd defendant, it was contended that based on its records, the plaintiff's cause of action arose in the year 2005. Under s. 6(1) of the Limitation Act 1953, an action should be filed within 6 years and under section 2 of the Public Authorities Protection Act 1948 which is applicable to the 2nd defendant by virtue of section 124 of the Local Government Act 1976, an action shall not lie or be instituted unless it is commenced within thirty-six month.

Citing the case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389, learned counsel for the 2nd defendant submitted that the 2nd defendant is accorded mandatory immunity under s. 95(2) of Act 133.

For the plaintiff, essentially it was submitted that looking at the statement of claim as a whole, the defendants' computation of the time period is incorrect and that time should start from 2008 after IKRAM had done the necessary tests to determine the actionable damages.

DECISION

It is trite that recourse to the summary procedure of striking out can only be adopted when it is clearly seen that a claim or answer is obviously unsustainable (see *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).



Although limitation is the common ground for both applications, the 1st and the 2nd defendant are at variance as to the date on which the plaintiff's cause of action accrued. This shows that it is not so clear cut as to when the plaintiff's cause of action arose.

Paragraph 2 of the plaintiff's reply makes reference to "aduan daripada penduduk Jalan Wawasan 4/6." No specific mention was made to the plaintiff's house. On the contrary, the plaintiff's statement of claim pleads that "struktur rumah plaintif terjejas in 2007" and that "IKRAM telah menjalankan ujian-ujian di premis tersebut pada atau sekitar pertengahan tahun 2008."

From established authorities it is accepted that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed (see *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 1 CLJ 69).

I am of the view that the plaintiff's claim herein on the face of it is not one which is obviously unsustainable. Evidence must be led to show when the damage to the plaintiff house occurs and when did all the facts happen.

Although the 1st defendant contends that the plaintiff's cause of action accrued in 2003 and the 2nd defendant contends it to be in 2005, it could very well be that only after IKRAM conducted tests in



2008 that the parties responsible for the defects are being identified. If all the facts have happened in 2003 and were already available to the plaintiff to sue, there is no need for IKRAM to conduct a test to determine the cause of the problem.

On the second ground advanced by the 2nd defendant, section 95(2) of Act 133 provides:-

“12. The State Authority, local authority and any public officer or employee of the local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or the plan thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or an employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.”

Whether or not the works in respect of the plaintiff's claim herein were carried out in accordance with the provisions of Act 133 or any by-laws made thereunder could not be determined at this stage. It needs to be investigated at a full trial. And I noted that the judgment of the Federal Court in *Majlis Perbandaran Ampang Jaya* cited by learned counsel for the 2nd defendant on the immunity of



the local authority was made after a full trial and upon finding of facts.

Based on the above, I dismissed both enclosures 32 and 34 with costs.

(TENGKU MAIMUN TUAN MAT)
HAKIM
MAHKAMAH TINGGI MALAYA
BAHAGIAN SIVIL
SHAH ALAM

Dated: 19 DECEMBER 2012

Counsel:

For the plaintiff - E Ramesh (Counsel); M/s V Samynathan & Co

For the first defendant - S Bhuvanes; M/s Izral Partnership

For the second defendant - Sathyananthan; M/s S N Nair & Partners