

**Modular MJ Sdn Bhd and Others v Modular Resources Sdn Bhd and Others [2006]
MLJU 574**

Malayan Law Journal Unreported

High Court (Kuala Lumpur)

Abdul Wahab Bin Patail, J

CIVIL NO S 6(S1)-2 1-146-1998

30 August 2006

Case Summary

CONTRACT — Privity — Housing Development Account — Plaintiff providing security for account benefiting third party — Whether account held in trust for plaintiff — Whether plaintiff could make claim based on account

Dato' Krishna Kumar, Shahrizal Hisham, D. Paramalingam (*Krish Maniam & Co*) for the Plaintiffs

S. Ashok (TK Wong Tan & Associates) for the 1st Defendant

G. Vijay Kumar (Lee Hishamuddin Allen & Gledhill) for the 4th Defendant

GROUNDINGS OF JUDGMENT

1. On 16/3/2004 the Court, having heard the submissions on behalf of the Plaintiffs and the 4th Defendant RHB Bank (Formerly Kwong Yik Bank Bhd.), ordered that the Plaintiffs' action against the 4th Defendant be dismissed with costs.
2. The claim filed by the Plaintiffs against the 4th Defendant is for the following reliefs: —
 - a) A declaration that the 4th Defendant is a fiduciary and/or constructive trustee for or in relation to the 1st Plaintiff;
 - b) An account of all monies due and owing from the 1st Plaintiff to the 4th Defendant;

- c) An injunction against the 4th Defendant and their servants, agents, nominees, employees, offices and/or directors to compel them to immediately take over management of the Housing Development Account (HDA Account) and to effect payment on all outstanding certified Architects certificates. In particular, Architects certificates number 6, 7 and 8 and to thereafter deposit such payments into the Contract Financing Account under Account No. 0-14015-4-3716-4 held at the 4th Defendant's bank and to thereafter apply the said sums in the Contract Financing Account toward settlement of all monies due and owing to the 4th Defendant under OD-1 and OD-2 with the balance if any thereafter to be paid to the 1st Plaintiff.
3. In accordance with the directions given by the Court, the parties formulated the sole issues to be determined at this stage by this Court as follows:
 - a) Whether the 4th Defendant is or had at any time been the 1st Plaintiff's fiduciary and/or constructive trustee in respect of the HDA Account?
 - b) Whether if the 4th Defendant is or had at any time been the 1st Plaintiffs fiduciary and/or constructive trustee of the HDA Account, it had breached its obligations as a fiduciary and/or constructive trustee?
 - c) Whether the 4th Defendant was entitled to take-over the management of the HDA Account and to effect payment of all outstanding certified Architect certificates?
 - d) Whether the 4th Defendant was under any legal obligation or duty to take-over the management of the HDA Account?
 4. The primary issue is whether the 4th Defendant is a fiduciary and/or a constructive trustee of the 1st Plaintiff in respect of the HDA Account.
 5. The 1st Plaintiff is a joint-venture between the 2nd Plaintiff and the 1st Defendant. The 1st Plaintiff was appointed the main contractor by the 1st Defendant for the construction of phase 2A of the then proposed Gurney Heights Condominium ("the Project"). The 4th Defendant granted the following loan facilities to the 1st Plaintiff to finance the construction of the Project as follows:
 - a) A straight overdraft facility of RM2,000,000 (OD-1); and
 - b) An overdraft of up to RM4,000,000-00 to be released progressively against Architect's certificates (OD-2). It was a term of the loan agreement that the 4th Defendant would disburse 80% of the value of each certificate presented to it by the 1st Plaintiff into the HDA Account.
 6. The banking facilities were secured by:
 - a) a Letter of Guarantee executed by the Directors of the 1st Plaintiff dated 7/4/1997,

- b) an Assignment of Contract Payments dated 3/6/1997, and
 - c) an Assignment of the Project by the 1st Defendant dated 3/6/1997.
7. The Assignment of the Project was agreed to by the 3rd Defendant as the joint developer of the Project, subject to the terms and conditions set out in their letter dated 24/3/1997.
 8. It was agreed that funds would be released from OD-1 and OD-2 into the HDA Account held in the name of the 1st Defendant, the authorised signatories of which were the representatives of the 1st and 3rd Defendants. Thus, the sum of RM2,000,000 was released from OD-1 into the HDA Account. Architect's Certificates No. 4 and 5 were submitted by the 1st Plaintiff. The 4th Defendant disbursed 80% of the value of the Architect's Certificates into the HDA Account.
 9. The 4th Defendant then received Architect's Certificates No. 6, 7 and 8 from the 1st Plaintiff, who instructed the 4th Defendant not to disburse any sums pursuant to those certificates into the HDA Account.
 10. Subsequently, the 1st Plaintiff was terminated as the main contractor for the project. The 1st and 2nd Plaintiffs then requested the 4th Defendant to exercise the latter's rights under the Assignment dated 3/6/1997 to appoint the 2nd Plaintiff as the new developer of the project and to take control of the HDA Account.
 11. The Plaintiffs filed this suit when the 4th Defendant did not accede to the request by the 1st Plaintiff. Whereupon the Plaintiffs commenced this suit.

Whether the 4th Defendant was the Plaintiff's Fiduciary and/or constructive trustee in respect of the HDA Account

12. This argument is founded upon the fact the 4th Defendant was the assignee under the Deed of Assignment of Contract Payments and Deed of Assignment of the Project.
13. The beneficial owner of the HDA Account was at all material times the 1st Defendant. The signatories of the HDA Account are the representatives of the 1st and the 3rd Defendants. There is no privity between the 1st Plaintiff and the 4th Defendant in respect of the HDA Account under the assignments so as to enable the 1st Plaintiff to set up any basis for an order for the 4th Defendant to take over the operation of the HDA Account and to make payments to the 1st Plaintiff.
14. The HDA Account is set up pursuant to section 7A of the Housing Development (Control and Licensing) Act 1966 with terms for the protection of house buyers. The section provides:
 - 7 **A. Licensed housing developer to open and maintain Housing Development Account**

- (1) Subject to subsection (9), every licensed housing developer shall open and maintain a Housing Development Account with a banker finance company for each housing development undertaken by the licensed housing developer.
- (2)
- (3) The licensed housing developer shall pay into the Housing Development Account of a housing development the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development and any other sum or sums of money which are required by regulations made under this Act to be paid into the Housing Development.
- (4) The licensed housing developer shall not withdraw any money from the Housing Development Account except as authorised by regulations made under this Act.
- (5) Subject to subsection (6) (b), all monies in the Housing Development Account and all moneys held by the stakeholder shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event—
 - (a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or
 - (b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.
- (6) Upon the happening of any of the event referred to in subsection (5) —
 - (a) The monies in the Housing Development Account and moneys held by the stakeholder shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account and moneys held by the stakeholder are authorised by regulations made under this Act to be withdrawn; and
 - (b) any money remaining in the Housing Development Account and all moneys held by the stakeholder, after all payments have been made pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing 'developer to be applied in accordance with the law relating to bankruptcy of or the winding-up of a company.

(7) Notwithstanding any other written law to the contrary, all as in the Housing Development Account and all moneys held by the stakeholder shall not be garnished until all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled.

(8)

(9) This section shall not apply to any housing development carried on by a licensed housing developer where all the housing accommodation in the housing development will not be offered for sale and purchase before the completion of the housing development and the issuance of certificates of fitness for occupation."

15. Access to the HDA Account is purely regulated under the regulations under the Act. Although the funds in the HDA Account are to be used for payment to the contractors, only the operator of the account has access to draw upon it to pay the contractor, except in the events set out in section 7A (5). Accordingly, there can be no question of the 4th Defendant owing any fiduciary duty to the 1st Plaintiff in respect of the HDA Account. In *Sri Permata Sdn Bhd v PPH Realty Sdn Bhd : Lingkaran Cemerlang Sdn Bhd* [2001] 7 CLJ 633 the contractor argued that the freezing of the HDA Account had prejudiced its rights as the turnkey contractor since it could not draw out the monies in the account to make various payments to its suppliers and workers. Justice Abdul Hamid Embong J (as he then was) in dismissing the contractor's application held:

As for the HDA Account, it is clear from s 7A of the Act that the defendant was under a statutory obligation to open and maintain this account. Under s 7A(2) it is provided that the defendant as the licensed housing developer needs to open and keep a HDA account for each of the phases of development in the case where a housing development is to be development is to be development in phases

It is also not disputed that LC had no link to the HDA account. It's complaint is that it could not draw on that account to make payments to its suppliers and workers. However, even without the restraint now put on the HDA account, LC could not put its hand on it. It is the defendant, as the licensed housing developer, and the defendant alone, that can draw on that account

His argument that LC had an equitable interest in the HDA account is unfortunately misconceived. That LC had no rights to the HDA account needs no further elaboration as this has been considered earlier"

16. The relationship between the 4th Defendant and the 1st Plaintiff is that of banker and customer. It is a purely contractual relationship. It is settled law that the relationship between a banker and its customer is one of debtor and creditor. There

is nothing before the Court to show the existence any other relationship as would create a fiduciary relationship.

17. Similarly as constructive trustee. The HDA Account was never maintained as an account in trust for the 1st Plaintiff. In *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 the Federal Court held that a bank could not be liable as a constructive trustee to its customer unless it was in breach of its contractual duty of care to the customer. Since the HDA Account is not the 1st Plaintiff's account, no duty of care arises towards the 1st Plaintiff.
18. It was submitted for the Plaintiffs that the OD-1 and OD-2 facilities was obtained by the 1st Plaintiff to be utilized as working capital for the Project. The 1st Plaintiff was to execute an assignment of contract payments, namely all sums due on interim certificates payable to the 1st Plaintiff as management contractors in favour of the 4th Defendant. The Deed of Assignment of Contract Payments dated 3/6/1997 was duly executed between the 1st Plaintiff and the 4th Defendant for that purpose.
19. It was also submitted that the 1st Plaintiff's directors, namely Choy Tai Seng, Hamdan Bin Ismail, Zainal Aabidin Bin Khusrin and Abdul Halim Bin Haji Dahlan, executed a Letter of Guarantee and Indemnity for RM6,000,000 on 7/4/1997.
20. It is true the financing scheme does appear unique in nature in that the 1st Plaintiff and its directors as contractors were in effect financing the Project owned by the 3rd and the 1st Defendants. Even though the said facilities were provided by the 4th Defendant with the full knowledge that they were for the benefit of the 3rd and the 1st Defendants, and upon security provided by the 1st Plaintiff and its directors, the fact remains that the 1st Plaintiff and its directors remain in the same position as any other guarantor or provider of security for the benefit of another. Their remedy, if any, lies in other directions but cannot create a fiduciary or constructive trustee relationship as between the 4th Defendant and the 1st Plaintiff.

The Other Issues

21. In the light of the above the other issues are irrelevant.

Decision

22. The Plaintiffs' action against the 4th Defendant was, therefore, dismissed with costs.