IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN MALAYSIA
[CIVIL APPEAL NO: BA-12BNCC-23-11/2023]

BETWEEN

SIDHU BROTHERS TRANSPORT SD BHD … APPELLANT

AND

SIME DARBY AUTO CONNEXION SDN BHD … RESPONDENT

IN THE SESSIONS COURT OF SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
[CIVIL SUIT NO: BA-A52NCC-571-12/2020]

BETWEEN

SIDHU BROTHERS TRANSPORT SDN BHD … PLAINTIFF

AND

SIME DARBY AUTO CONNEXION SDN BHD … DEFENDANT

GROUNDS OF JUDGMENT

Introduction

[1] This is an appeal by the Appellant against the decision of the learned Session Court Judge (**SCJ**), after a full trial, who had dismissed their claim with cost to the Respondent, RM20,000.00.

[2] After hearing both parties, perusing the Appeal Record, and read the

submissions filed, I found that the SCJ's reasons for dismissing the Appellant's claim were reasonable and adequately explained. I am satisfied that she had sufficiently appreciated the evidence before her and had not misdirected herself to the law.

[3] The appeal was dismissed, and the SCJ's decision was affirmed. The Appellant has now appealed to the Court of Appeal, and I have set out my reasons below.

The Facts

[4] On 1.7.2020, the Appellant placed orders for two (2) vehicles that were already pre-registered with the Jabatan Pengangkutan Jalanraya (**JPJ**), namely a Ford Ranger registration no. SYF 6683 (**Ford Ranger**) and Ford Everest registration no VDD 832 (**Ford Everest**).

[5] On the same day, the Appellant paid the Respondent a total of RM1000.00, i.e. RM500.00 each for the Ford Ranger and Ford Everest (**the vehicles**) as allegedly pre-booking fees, and the Respondent issued a Retail Customer Order dated 1.7.2020.

[6] The Respondent confirmed the receipt of the Appellant's abovementioned payment of RM1,000.00.

[7] The car price of the Ford Ranger was RM75,057.54.00, and the Ford Everest was RM176,613.88.

[8] However, an arrangement was made, and it was known to both parties that the Appellant requested an increase in the price of the vehicles to obtain a higher loan amount from the financier. To accommodate this, the Respondent representative prepared new price quotations.

[9] Respondent asserts that the financiers rejected the Appellant's application for the loans twice, on 15.7.2020 and 2.10.2020. As the Appellant failed to obtain approval from any financiers, the Respondent, at or around 10.10.2020, informed the Appellant that both the vehicles had been sold to another buyer. From the witness's testimony, the vehicles

were sold before October 2020.

[10] It was the Appellant's case that they were ready, willing and able to purchase the vehicles. As such, the Appellant claimed that they had sustained losses, in which the reliefs and damages claimed by the Appellant against the Respondent as in para 12 and 13 of the Statement of Claim (**SOC**).

[11] For ease of reference, the Appellant seek the following reliefs in its original language (pages 27-29 of the AR Jilid 1):

i. Satu Perintah deklarasi bahawa RTO FORD RANGER tersebut dan RTO FORD EVEREST adalah masih kekal;

ii. Satu Perintah dekrarasi bahawa Defendan terah melanggar RTO FORD RANGER tersebut dan RTO FORD EVEREST;

iii. Suatu Perintah pelaksanaan spesifik RTO FORD RANGER tersebut dan RTO FORD EVEREST bersama suatu perintah yang mengarahkan Defendan untuk melakukan tindakan-tindakan sedemikian atau melaksanakan dokumen-dokumen sedemikian sebagaimana yang perlu bagi maksud pelaksanaan spesifik, dalam tempoh 14 hari dari tarikh perintah ini;

Atau

sebagai gantian (in lieu) bayaran tunai kepada Plaintif oleh Defendan perbezaan harga belian diantara kenderaan yang ditempah selaras dengan perjanjian RTO FORD RANGER tersebut dan RTO FORD EVEREST dengan kenderaan lain di pasaran yang mempunyai spesifikasi yang sama

iv. Ganti rugi menyewa kenderaan pancuan empat roda sebanyak RM3,000-00 setiap bulan dari tarikh 10/10/2020 sehingga penyelesaian isu perlanggaran perjanjian RTO FORD RANGER tersebut;

v. Kerugian mengunakan kenderaan FORD EVEREST tersebut sebanyak RM3,000-00 sebulan dari tarikh pemfailan saman disini sehingga 31/12/2020

vi. Ganti rugi sebanyak RM3,000-00 sebulan dari tarikh 1/1/2021 sehingga selesai isu perlanggaran perjanjian RTO FORD EVEREST tersebut.

vii. Suatu Perintah bahawa Defendan hendakrah membayar praintif ganti rugi contoh sebanyak RM200,000.00;

viii. Faedah ke atas jumlah wang yang perlu dibayar oleh Defendan kepada Plaintif pada kadar 4% setahun dari tarikh pemfailan tindakan ini sehingga tarikh penyelesaian penuh

ix. Kos atas dasar peguamcara dan anakguam; dan

x. Lain-lain relif yang Mahkamah yang Mulia ini fikirkan suai dan manfaat.

[12] The point of appeal raised by the Appellant was primarily whether there was an agreement binding between parties with respect to the purchase of the vehicles, whether the said agreement was binding, and whether the Respondent had breached the agreement.

Findings of the SCJ

[13] From the grounds of judgment, the SCJ had made the following findings:

1. The SCJ decided that there was no binding contract between the parties as the Appellant was only paid a pre-booking fee of RM1000, which was the standard procedure for any party intending to buy a vehicle to pay a pre-booking fee of an agreed amount.

2. The SCJ took judicial notice that it was an accepted practice for the prospective buyer to pay a pre-booking fee before getting a financier to finance the said vehicles.

3. The case of *Nai Yau Juu v. Pasdec Corp Sdn. Bhd. & Anor* [2005] 3 MLJ 431 was referred to justify the fact that there were several other details and conditions to be fulfilled; therefore, the contract cannot be said to have been concluded.

4. The SCJ further found that the pre-booking fees paid by the Appellant cannot be deemed as a "firm order" and a binding contract between the parties in regard to the sale of both vehicles.

5. The application for the loan was rejected regardless of whether the Respondent had assisted the Appellant in obtaining financing for the vehicles.

6. Respondent's representative action in assisting the Appellant to apply for the loan cannot be construed as confirming the Appellant as the beneficial owner of the vehicles because the purchase price had not been fully paid.

7. Not only did the Appellant fail to secure a loan, but there was also no indication that they were interested or able to pay the purchase price in cash.

8. The obligation to finance the purchase is not on the Respondent as a dealer but the duty of the Appellant.

9. The SCJ also considered the actions of Plaintiff, who changed the name of the party for the purchase of the vehicles; therefore, having a different entity from the Respondent's initial company resulted in a different offer to purchase the vehicles. It was decided that the initial offer became unenforceable due to the counter-offer to change the parties' identity (see *Mahabuilders Berhad v. Hotel Rasa Sayang Sdn. Bhd* [2014] 3 CLJ 661).

10. Due to the unconcluded contract, the issue of specific performance and damages does not arise.

11. Filing of documents to prove damages after the filing of the

Respondent's case is not admissible under s.73A(3) of the Evidence Act (see *Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360).

The Law on Appellate Intervention

[14] An appellate court should be slow in disturbing the findings of facts arrived by the trial court, which had the advantage of seeing and hearing the witnesses (audio-visual advantage) unless there are substantial and compelling reasons for disagreeing with the finding or such finding is clearly against the weight of evidence (see *Che Omar Mohd Akhir v. Public Prosecutor* [2007] 3 CLJ 281 and *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457).

[15] Further, the appellate Court will also not interfere unless the trial court is shown to be plainly wrong in arriving at its decision. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM), reiterate the principle to be followed by an appellate court when reversing findings of fact by a trial court:

> "[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 *(at p 10) per Steve Shim CJ (Sabah & Sarawak).* More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:
>
> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence

(see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] CLJU 32; [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; *and Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309)".

[16] The established decisions by the Apex Court, as quoted above, were recently reaffirmed by the Federal Court in the case of *Triple Equity Sdn Bhd & Anor v. Golden Success Property Sdn Bhd* [2023] 3 CLJ 387, as follows:

"[50] In the case of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, the Federal Court when addressing the primary issue of whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge at p. 800 opined:

> It is well settled law that an appellate court will not generally speaking, interfere with the decision of a trial judge unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] CLJU 32; [1978] 1 LNS 32*; Watt or Thomas v. Thomas* [1947] AC 484*; and Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309)"

[17] In addition, the Court of Appeal in the case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 held as follows:

> "It is trite law that this Court will not readily interfere with the findings of fact arrived at by the Court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case, where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion".

Analysis and Findings

[18] This case concerns a contractual dispute whether there was a binding contract between the Appellant and Respondent with regard to the alleged purchase of the two vehicles.

Pre-booking fees

[19] It was undisputed that the Appellant had paid pre-booking fees of RM500 each, which, according to Respondent, was refundable.

[20] The issue that arises is whether the pre-booking fees paid conclude the contract to purchase the vehicles, and the fact that it was sold to another party constitutes a breach of contract in which the Appellant now claims damages.

[21] The Appellant submitted that the SCJ had misdirected herself on her observation that the contract was not concluded as the pre-booking fees were an integral part of the agreement, and it was not disputed that Respondent had admitted that there was no documentary evidence to prove that the loan was rejected.

[22] Appellant further contends that there is no reason for the Respondent to sell off the vehicles before October 2020, having the fact that they have no documentary proof of the rejection (by the financiers).

[23] The Appellant referred and relied on the Federal Court case *of PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor (and 6 Other Cases)* [2021] 3 AMR 44 and quoted the passage below:

> "a bargain was indeed made at the time of the payment of the booking fee. In our judgment, the legislative intent was that the initial payment of monies, in the form of a deposit, is sufficient to constitute an intention to enter into a contract given that the agreement would have to be signed at the same time".

[24] However, I find that the Appellant failed to appreciate the difference

between a booking fee, as in the agreement, and a pre-booking fee on an amount agreed upon by both parties.

[25] In the present case, none of the parties denied the terms and conditions of the Retail Customer Order. I refer to the relevant clause concerning *Booking Fees and Deposit* in clause 1 of the agreement:

> ***"BOOKING FEE AND DEPOSIT:***
>
> *1. (a) Upon the Purchaser's/Hirer's execution of the:-*
>
> *(i) Second Schedule under the Malaysia Hire Purchase Act 1967 (*Act) as prepared by the bank/financial institution ('Bank'), the Purchaser/Hirer shall pay to the company the booking fee of the sum equivalent to one percent (1%) of the On-The-Road Price as appearing overleaf ('Booking Fee'). The Booking Fee shall constitute part payment towards the deposit (as hereinafter defined).*
>
> *(ii)* hire purchase *agreement* prepared by the Bank, the Purchaser/Hirer shall pay the sum equivalent to nine percent (9%) of the On-The-Road Price (Outstanding Deposit) as appearing overleaf to the Bank (or the Company if the Bank has appointed the company to collect the same in writing).
>
> *The deposit shall be the total aggregate amount of the Booking Fee and the Outstanding Deposit.*
>
> *(b) The Company shall refund the sum equivalent to ninety percent (90%) of the Booking Fee ("Refund") to the Purchaser/Hirer if the Purchaser/Hirer shall cancel the order of the vehicle but before the Purchaser/Hirer signs the hire-purchase agreement with the Bank."*

[26] After perusing the clause above, I find that the pre-booking fee is not a booking fee referred to in the agreement, as the amount of RM500 is not equivalent to 1% of the vehicle's price. It was clearly stated that only the

booking fee should constitute a partial payment towards the deposit, which is 9% of the vehicle price.

[27] Respondent firmly states that as the Appellant failed to get financing for the vehicles, no contract eventuated, which I agree with.

[28] As submitted, there were many steps ahead for a sale contract and hire purchase contract to crystalize; that is, the Appellant will need first to obtain a hire purchase loan from a financial institution to finance the hiring of both vehicles. Secondly, the Appellant had to pay Respondent as the dealer on behalf of the financier the downpayment for the hire-purchase loan and finally, for the financier to release the hire-purchase loan for the purchase to be concluded (See the Retail Customer Orders pages 279- 280 of AR Jilid 2).

[29] I am of the view that the SCJ was right to conclude that the pre-booking fee is not a binding contract between the parties. It was merely a standard practice or negotiations between parties before the final agreement could be entered upon further steps to be taken.

[30] In the case of *Keng Huat Film Co Sdn. Bhd v. Makhanlall (Properties) PTE LTD* [1983] CLJ (Re) 186, the Federal Court ruled that:

> "For the construction of a written agreement the established doctrine Is firstly to **exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and** secondly to **exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible.**"
>
> -emphasis added

[31] After considering the circumstances of this case, I find that the RM1000 paid was merely a pre-booking fee, and it was never the booking

fee nor a deposit. It was clear from the agreed terms of the Retail Customer Order that the booking fee was 1% of the purchase price, whilst the deposit was 9% of the vehicle's price. Therefore, the amount of RM500 each was not equivalent to any of those terms, be it a booking fee or a deposit (See page 296 of AR at enclosure 18).

Rejection of the loans

[32] Appellants also submitted that they could have purchased the vehicles without financing, even if the financing was rejected.

[33] From the notes of proceedings, I find that the Appellant was aware that the loan application had been rejected according to SP1's statement. Although the Appellant has vigorously argued that the Respondent had no evidence that the loan had been rejected, I believe that the Appellant also did not prove or could not prove that any applications for a loan were pending or willing to pay in cash at that time. The SCJ had clearly stated in her grounds of judgment that there was never any evidence before her that the Appellant had indicated that they would pay cash for the sale of the vehicles. Moreover, SP1 admitted this in his cross-examination (see page 97 of AP Jilid 1).

[34] Respondent submitted that the act of the Appellant representative using another entity (Syarikat Sidhu Adek Beradek Sdn Bhd) to apply for the hire purchase loan and naming Pengangkutan Lori MS Sdn Bhd and Syarikat Sidhu Adek Beradek Sdn Bhd as the substituted hirers in place of Sidhu Brothers (Appellant), was a variation on the Retail Customer orders previously issued which tantamount to a counter-offer.

[35] In this regard, I find that the SCJ was correct in her reliance on the case of *The Ka Wah Bank Ltd. v. Nadinusa Sdn. Bhd. and Anor* [1998] 2 CLJ 486 where the Federal Court held as below:

> "According to *Chitty on Contracts*, 26th Edn. (1989) Vol. 1, para. 54, p. 44, "an acceptance is a final and unqualified expression of assent to the terms of the offer". But, where the

> reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject..”

The Refund of RM1000

[36] On the amount RM1000 held by Respondent, Appellant asserts that the SCJ had not ordered it to be refunded; therefore, it reflects that the contract was binding between parties and has existed to date.

[37] The Respondent had forwarded the cheque for RM1000 to the Appellant through its solicitors on 13.1.2022; however, the Appellant refused to accept the said cheque and demanded payment of damages instead.

[38] In this regard, I agree with the Appellant that the amount (RM1000) should be refunded but it cannot be an indication or inference that there was a binding contract as this does not come into existence by the mere assumption of an act or omission of the parties but only after all the elements of a binding contract have been established.

Conclusion

[39] Consequently, based on the reasons discussed above, having considered the submissions by both learned counsels as well as all the materials placed before me, I find that the SCJ had not misdirected herself in making her findings, and sufficient evaluation of evidence has been made.

[40] The SCJ rightly held that the Appellant could not prove its claim and that there was no binding contract between the parties. The RM1000 was merely a payment to express interest in entering into an agreement to order the vehicles and was not a booking fee within the meaning of the Retail Customer Order.

[41] Therefore, the SCJ's decision is upheld and affirmed. This appeal is hereby dismissed with a cost of RM3,000 to the Respondent, subject to allocator fees, and I have made an additional order that the RM1000 be refunded to the Appellant.

Dated: 10 DECEMBER 2024

(NOOR HAYATI HAJI MAT)
Judicial Commissioner
Shah Alam High Court
NVCV 9

Counsels:

For the Appellant - Ekbal Singh Sandhu Gorumak Singh, Ravind & Woodhull; M/s Azian & Co

For the Respondent - Steven Wong Chin Fung, James Ng Kean Yip & Tengku; Hazwanhisyam; M/s Arifin & Partners