EXCEL CHAMP AUTOMOBILE SDN BHD v. BERMAZ MOTOR TRADING SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[ORIGINATING SUMMONS NO: BA-24NCVC-467-04-2018]
29 MARCH 2019

CIVIL PROCEDURE: *Interpleader – Costs – Dealership agreement for sale of cars between distributor and plaintiff company – Sale financed by banking facilities and repayment secured by debenture – Floating charges created over assets of plaintiff – Plaintiff defaulted in repayment of facility – Court's discretion to award costs – Whether plaintiff's breaches caused losses to distributor and bank – Whether plaintiff may be deprived of costs of proceedings – Whether plaintiff could be ordered to pay costs to distributor and bank – Rules of Court 2012, O. 17 r. 8*

The first defendant distributed 'Mazda' cars and entered into a vehicles sales dealer agreement ('dealership agreement') with the plaintiff which, among others, allowed the plaintiff to sell Mazda cars. Consequently, the plaintiff sold Mazda cars in its showroom. The dealership agreement was subsequently renewed. The second defendant company, a licensed bank ('bank'), provided a 'floor stocking facility' to the plaintiff ('facility') with the limit of RM1.5 million, secured by the first debenture in favour of the bank, including the floating charge over all assets of the plaintiff. The first debenture, including the floating charge, had been registered with the Registrar of Companies ('ROC'). Upon an application by the plaintiff, the bank increased the facility to a limit of RM3 million, which was secured by a supplementary debenture in favour of the bank ('second debenture'), particulars of which, including the floating charge, had been registered with the ROC. All the cars had been purchased by the plaintiff from the first defendant with funds from the facility but the first defendant had not been paid by the plaintiff. The bank's officer visited the showroom and found that none of the cars were at the showroom. The bank then wrote a letter dated 23 April 2018 to the plaintiff, which, among others: (i) requested the plaintiff to inform the bank about the whereabouts of the cars on an urgent basis; and (ii) stated that the facility had been suspended because of the plaintiff's breach of the facility agreement. The plaintiff did not reply to the bank's letter dated 23 April 2018. The bank lodged a police report because the cars had been removed from the showroom without the bank's consent. This originating summons ('OS') was an interpleader filed by the plaintiff and raised the questions: (i) whether the first defendant or the bank was entitled to the cars which had been sold by the first defendant to the plaintiff but the plaintiff had not paid the first defendant and the bank had financed the sale by way of the facility. This issue required ascertainment as to who had property in the cars under ss. 19 and 20 of the Sale of Goods Act 1957 ('SGA'), in that:

A (a) whether the dealership agreement provided for a '*Romalpa* clause' (retention of title clause) which enabled the first defendant to retain property in the cars until the first defendant was paid in full for the cars; (b) whether the property in the cars passed from the first defendant to the plaintiff under ss. 19(3) and 20 SGA; and (c) if the property in the cars had B passed from the first defendant to the plaintiff under ss. 19(3) and 20 SGA: (1) whether the first defendant was deemed to have notice of the floating charges when particulars of, among others, the floating charges had been registered with the ROC under s. 108(1) of the Companies Act 1965 ('CA 1965'); and (2) whether the cars fell within the ambit of the floating C charges notwithstanding the fact that the sale took place after the registration of the floating charges; and (ii) whether the court should exercise its discretion under O. 17 r. 8 of the Rules of Court 2012 ('RC') to: (a) deprive the plaintiff of costs of this interpleader; and (b) order the plaintiff to pay costs of the OS to both the first defendant and the bank because: (1) the plaintiff has breached the dealership agreement and the facility agreement; D and (2) both the first defendant and the bank were innocent parties who have suffered losses due to the plaintiff's acts.

Held (ordering plaintiff to pay costs to first defendant and bank):

(1) The cars were 'specific goods' within the meaning of s. 2 of the SGA E because the cars had been 'identified and agreed upon at the time a contract of sale is made'. Section 2 of the SGA provides that goods are in a 'deliverable state' when they are 'in such state that the buyer would under the contract be bound to take delivery of them'. The term 'property' in s. 19(1) and (3) of the SGA has been defined in s. 2 SGA as F the 'general property in goods, and not merely a special property'. (paras 16-18)

(2) The dealership agreement was a commercial contract and should be interpreted in a commercially sensible manner. The dealership agreement did not provide, either expressly or by necessary implication, G that the first defendant should retain property in the cars until and unless the first defendant was paid in full for the cars by the plaintiff. In other words, the dealership agreement did not have a *Romalpa* clause which vested ownership of the cars in the first defendant until the plaintiff had paid in full for the cars. As the three conditions stipulated in s. 20 of the H SGA had been fulfilled, 'property' in the cars would pass to the plaintiff 'when the contract is made'. Hence, the property in the cars had passed from the first defendant to the plaintiff by virtue of ss. 19(3) and 20 of the SGA. (paras 23-25)

(3) Upon registration of the floating charges with the ROC, the public, I including the first defendant, was deemed to have notice of the floating charges. When a company creates a debenture over the company's assets, the debenture holder is a secured creditor of the company. (paras 26 & 27)

(4) Section 4(1) of the CA 1965 defines a 'debenture' to include 'debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not'. The cars (i) would fall within the wide definition of 'charged assets' in the debentures; and (ii) were acquired by the plaintiff after the execution and registration of the floating charges with the ROC. Nonetheless, the cars would form part of the charged assets which 'hereafter' belonged to the plaintiff under section 5.01 of the debentures. Furthermore, the floating charges were 'continuing security' pursuant to section 5.05 of the debentures and would include the cars which had been purchased by the plaintiff after the execution and registration of the floating charges with the ROC. As the cars fell within the wide purview of the floating charges, the bank, and not the first defendant, was entitled to the cars. However, as the bank was not a party to the dealership agreement, based on the doctrine of privity of contract, the bank was not bound by the dealership agreement. (paras 28 & 33-35)

(5) The court has a wide discretion to award costs for interpleader proceedings pursuant to O. 17 r. 8 of the RC and such exercise of judicial discretion is dependent on the particular facts of the case. Despite the fact that the interpleader was rightly commenced by the plaintiff, the court, in the exercise of its discretion under O. 17 r. 8 of the RC ordered the plaintiff to pay costs of the OS to both the first defendant and the bank based on the following exceptional circumstances: (i) the plaintiff had breached the dealership agreement by not paying the first defendant for the sale of the cars; (ii) the plaintiff had not only defaulted on the facility but had also removed the cars from the showroom without the bank's consent. The plaintiff did not even have the candour to reply to the bank's letter and there was a police report lodged against the plaintiff by the bank; (iii) the first defendant and the bank were blameless; and (iv) the plaintiff's breaches had caused losses to the first defendant and the bank. (paras 38 & 39)

Case(s) referred to:

AIMB Marketing Sdn Bhd & Ors v. Malaysian Trustees Bhd & Ors [2010] 1 LNS 551 CA ***(refd)***

Au Yong Kun Min v. Tractors Malaysia Bhd [1997] 5 CLJ 31 HC ***(refd)***

Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

CIMB Bank Bhd v. ZAQ Construction Sdn Bhd [2013] 1 LNS 230 HC ***(refd)***

Illingworth v. Houldsworth & Anor [1904] AC 355 ***(refd)***

Interdeals Automation (M) Sdn Bhd v. Hong Hong Documents Sdn Bhd [2009] 2 CLJ 321 CA ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Malaysian International Merchant Bankers Bhd v. Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2) [1998] 4 CLJ Supp 32 HC ***(refd)***

A *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA* ***(refd)***
NGV Tech Sdn Bhd & Anor v. Ramsstech Ltd & Ors [2015] 1 LNS 1017 HC ***(refd)***
Peter Yip Shou Shan v. George Kent (M) Bhd & Anor [2002] 2 CLJ 205 HC ***(refd)***
Tan See King & Anor v. Anata Knitting Industry (M) Sdn Bhd [2012] 1 LNS 252 CA ***(refd)***

B **Legislation referred to:**
Companies Act 1965, ss. 4(1), 108(1)
Rules of Court 2012, O. 17 r. 8
Sale of Goods Act 1957, ss. 2, 19(1), (2), (3), 20

For the plaintiff - Tan Yen Ning; M/s Foo Hiap Siong & Co
C *For the 1st defendant - Vasanthi Sathasivam & Subathra KS Nathan; M/s K Sugu & Assocs*
For the 2nd defendant - Wan Azhab Wan Din & Baba Hadil Baba Zain; M/s Azam, Baba & Aqmar

Reported by S Barathi

D

JUDGMENT
(encl. 1)

Wong Kian Kheong J:

E **Introduction**

[1] The first defendant company (first defendant) distributes "Mazda" cars and has entered into a "vehicles sales dealer agreement" (dealership agreement) with the plaintiff company (plaintiff).

F **[2]** The dealership agreement, among others, allows the plaintiff to sell Mazda cars.

[3] The second defendant company is a licensed bank (bank) which has provided a "floor stocking facility" to the plaintiff (facility). The repayment of the facilities by the plaintiff is secured by two debentures created by the plaintiff in favour of the bank (debentures). The debentures provide for, among others, floating charges to be created over all assets of the plaintiff (floating charges).

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Issues

[4] This originating summons (OS) is an interpleader filed by the plaintiff and raises the following questions:

H

(i) whether the first defendant or the bank is entitled to 26 Mazda cars (cars):

(a) which have been sold by the first defendant to the plaintiff (sale) but the plaintiff has not paid the first defendant for the sale; and

I

(b) the bank has financed the sale by way of the facility.

To decide the above issue, it is necessary to ascertain who has property in the cars under ss. 19 and 20 of the Sale of Goods Act 1957 (SGA). In this regard:

(1) whether the dealership agreement has provided for a "*Romalpa* clause" (retention of title clause) which enables the first defendant to retain property in the cars until the first defendant is paid in full for the cars;

(2) has property in the cars passed from the first defendant to the plaintiff under ss. 19(3) and 20 SGA?; and

(3) if property in the cars has passed from the first defendant to the plaintiff under ss. 19(3) and 20 SGA:

(i) whether the first defendant is deemed to have notice of the floating charges when particulars of, among others, the floating charges have been registered with the Registrar of Companies (ROC) under s. 108(1) of the then applicable Companies Act 1965 (CA (1965)). This OS does not concern the Companies Act 2016 which comes into force on 31 January 2017; and

(ii) whether the cars fall within the ambit of the floating charges notwithstanding the fact that the sale took place after the registration of the floating charges; and

(ii) whether the court should exercise its discretion under O. 17 r. 8 of the Rules of Court 2012 (RC) to:

(a) deprive the plaintiff of costs of this interpleader; and

(b) order the plaintiff to pay costs of the OS to both the first defendant and the bank

because:

(1) the plaintiff has breached the dealership agreement and the facility agreement; and

(2) both the first defendant and the bank are innocent parties who have suffered loss due to the plaintiff's acts.

Background

[5] On 10 February 2011 the plaintiff and first defendant entered into the dealership agreement. Consequently, the plaintiff sells Mazda cars in its showroom (showroom). The dealership agreement was renewed on 11 December 2015.

[6] The facility with a limit of RM1.5 million was offered by way of a letter dated 2 May 2012 from the bank to the plaintiff. The plaintiff accepted the facility which stated, among others, as follows:

Security:

1. Debenture of RM1.5 million in a form of a floating charge over all the [plaintiff's] stock of motor vehicles financed by the (Bank) under the account ...

(emphasis added).

[7] To secure the plaintiff's repayment of the facilities, the plaintiff executed the first debenture in favour of the bank on 9 April 2013 (first debenture). Particulars of the first debenture, including the floating charge, had been registered with the ROC.

[8] The facility was renewed by the bank's letters dated 8 April 2014, 25 March 2015 and 24 March 2016 to the plaintiff.

[9] Upon an application by the plaintiff, the bank increased the facility to a limit of RM3 million by way of a letter dated 17 November 2016 (increase in facility). To secure the plaintiff's repayment of the increase in facility, the plaintiff executed a supplementary debenture in favour of the bank on 29 December 2016 (second debenture). Particulars of the second debenture, including the floating charge, had been registered with the ROC.

[10] All the cars had been purchased by the plaintiff from the first defendant with funds from the facility but the first defendant had not been paid by the plaintiff for the cars.

[11] The bank's officer visited the showroom and found that none of the cars were at the showroom. The bank then wrote a letter dated 23 April 2018 to the plaintiff (bank's letter dated 23 April 2018) which, among others:

(i) requested the plaintiff to inform the bank about the whereabouts of the cars on an urgent basis; and

(ii) stated that the facility had been suspended because of the plaintiff's breach of the facility agreement.

[12] The plaintiff did not reply to the bank's letter dated 23 April 2018. Consequently, the bank lodged a police report on 8 May 2018 because the cars had been removed from the showroom without the bank's consent (bank's police report).

[13] The bank had disbursed a total sum of RM2,963,254 to the plaintiff under the facility.

Who Has Property In The Cars?

[14] Sections 19 and 20 SGA provide as follows:

Property passes when intended to pass

19(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Specific goods in a deliverable state

20. Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

(emphasis added).

[15] The cars are "goods" as defined in s. 2 SGA as follows:

"goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

(emphasis added).

[16] The cars are "specific goods" within the meaning of s. 2 SGA because the cars have been "identified and agreed upon at the time a contract of sale is made".

[17] Section 2 SGA provides that goods are in a "deliverable state" when they are "in such state that the buyer would under the contract be bound to take delivery of them".

[18] The term "property" in s. 19(1) and (3) SGA has been defined in s. 2 SGA as the "general property in goods, and not merely a special property".

Whether Dealership Agreement Provides For First Defendant To Retain Property In The Cars Until First Defendant Has Been Paid For The Cars

[19] According to s. 19(1) SGA, when property in the cars is transferred from the first defendant to the plaintiff depends on the intention of the plaintiff and first defendant. To ascertain such an intention, s. 19(2) SGA provides that "regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case".

[20] In this case, cl. 11.1 of the dealership agreement provides that subject to cl. 8.1 (which confers a right on the first defendant to vary the dealership agreement), the dealership agreement "embodies the entire understanding of the parties and there are no prior promises, terms, conditions or obligations, oral or written, expressed or implied, other than those contained therein" (entire agreement clause). In *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd*

[2005] 2 CLJ 596, at 607-608, Nik Hashim JCA (as he then was) decided in the Court of Appeal that the effect of an entire agreement clause in a contract is that the contract "constitutes a binding agreement between (the parties) with regard to all matters mentioned in the contract and ... the contract does not permit any term to be implied or import any other consideration not in the contract". By virtue of the entire agreement clause, the court can only give effect to the dealership agreement without considering:

(i) the conduct of the first defendant and plaintiff; and

(ii) the circumstances of this case.

[21] The effect of ss. 19 and 20 SGA is explained in the following three cases:

(i) in *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal* [2000] 2 CLJ 197; [2000] 2 MLJ 70, at pp. 208-210 (CLJ); pp. 81-82 (MLJ), Gopal Sri Ram JCA (as he then was) decided as follows in the Court of Appeal:

> *In my judgment, that question falls to be resolved in accordance with the relevant provisions of [SGA] which in this instance are ss. 19 and 20 ...*
>
> *...*
>
> *The effect of these sections may be summarised thus. In a contract for the sale for specific or ascertained goods, property in them passes from the seller to the buyer according to the intention of the parties. That intention is to be gathered from the terms of the contract, the conduct of the parties and all the circumstances of the case. In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or the delivery of, the goods.*
>
> *It has been recognised by high authority that although the provisions of ss. 20 to 24 are merely rules that operate in the absence of a contrary intention, in practice, they are of much importance. That is because of the extreme difficulty in the great majority of cases to actually prove the intention of the parties. As Lord Wright said in Ross T Smyth & Co Ltd v. TD Bailey Son & Co [1940] 3 All ER 60 at p 67 when speaking of the corresponding English provisions:*
>
> > *It is true that all these rules, both under s. 18 and under s. 19, are prima facie rules, and depend on intention, but the intention in this regard by the parties is seldom or never capable of proof. It is to be ascertained, as already stated here, by having regard to the terms of the contract, the conduct of the parties and the circumstances of the case.*
>
> *There may, of course, be cases where the parties by words or conduct evince a clear intention that the property in specific goods is not to pass at the time the contract is made. In such a case, property in the goods will remain in the vendor until the event specified by the contract occurs. A case which*

illustrates this point is Au Yong Kun Min v. Tractors Malaysia Bhd [1997] 5 MLJ 168. There the vendors of a tractor retained ownership of it after having parted with possession to the buyer. They also reserved unto themselves the right to take possession of the tractor if there was any default in payment of any of the sums due under the agreement in question. In an instructive judgment, Augustine Paul J, reviewed all the relevant case law on the point and held quite rightly that the rule governing intention housed in the English equipollent of s. 20 had been displaced.

The present case is a far cry from Au Yong Kun Min v. Tractors Malaysia Bhd. Here, Wing Teik and Sabah Shipyard did not express any intention as to when property in the turbine (which comes within the category of 'specific goods') will pass from the one to the other. Neither is there any form of conduct or circumstances from which such intention is to be deduced. The rule expressed in s. 20 of the Sale of Goods Act 1957 therefore applies with full force. Accordingly, the property in the turbine passed from Wing Teik to Sabah Shipyard when the contract was made ... .

(emphasis added).

It is to be noted that there is no entire agreement clause in *BSNC Leasing*;

(ii) in the Court of Appeal case of *Interdeals Automation (M) Sdn Bhd v. Hong Hong Documents Sdn Bhd* [2009] 2 CLJ 321, at [4], [6] and [9], Gopal Sri Ram JCA held as follows:

[4] The first question that needs to be addressed is whether there was retention of title by the plaintiff. The answer to this question must be found from within the terms of the contract ...

...

[6] It is settled law that parties to a contract for the sale of goods may agree that the ownership in them would only be transferred from the vendor to the buyer when the latter has met all his or her obligations contained in the contract. See, Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd [1976] 2 All ER 552. Such a term in a contract for the sale of goods (styled a "Romalpa clause") has the effect of making the buyer a trustee or fiduciary of the goods for the seller thereby entitling the latter to trace them into the hands of third parties to whom the buyer may transfer them. Central to this proposition is the postulate that the Romalpa clause must be a term of the contract ...

...

[9] Once it is accepted, as I have, that the contract contained no Romalpa clause, no question of affording the plaintiff the right to retake possession of the machine arises. It is the general rule of construction housed in s. 20 [SGA] that applies ...

... It does not matter that the defendant was to pay the price in two stages. Property in the machine passed from the plaintiff to the defendant when the contract was made ...

(emphasis added); and

(iii) in *Au Yong Kun Min v. Tractors Malaysia Bhd* [1997] 5 CLJ 31, at 41, 42 and 44, Augustine Paul JC (as he then was) gave the following judgment in the High Court:

> *Where a contract of sale is conditional there is no transfer of the property to the buyer till the conditions are satisfied. An unconditional sale is a sale pure and simple, transferring the property absolutely to the buyer. A conditional sale is a sale subject to some conditions ....*
>
> *Under [s. 20 SGA] the property in the goods passes to the buyer when the contract is made even if the time of payment of the price, or the time of delivery of the goods, or both, is postponed subject to fulfillment of the following conditions:*
>
> *(a) The contract of sale must be unconditional*
>
> *With regard to the meaning of the phrase "unconditional contract" Siti Norma Yaakob J (as she then was) said in Ng Nat Siang v. Arab-Malaysian Finance Bhd & Anor [1988] 3 MLJ at p. 321:*
>
> > *In Benjamin's Sale of Goods, unconditional contracts have been defined to mean 'not subject to any condition suspensive of the passing of the property'*
>
> *(b) The contract must relate to specific goods ...*
>
> *(c) The goods must be in a deliverable state ....*
>
> *...*
>
> *The right of the seller to retake possession of the goods can also be achieved by the insertion of a Romalpa clause in the contract following the decision of the Court of Appeal in Aluminium Industrie Vaassen BV v. Romalpha Aluminium Ltd* [1976] 1 WLR 676.
>
> (emphasis added).

[22] The following provisions of the dealership agreement are relevant:

> *2.1.1 Supply of Vehicles*
>
> *As far as is possible to maintain regular supplies of the Vehicles to the Dealer who shall purchase the same from the Distributor such number of units of the Vehicles as shall be determined from time to time Provided Always That the Distributor shall in no way be responsible for any delay in supplying the Vehicles due to strikes, lock-outs, plant/machinery breakdowns, governmental restrictions, delay in shipments by the Distributor's principal or any cause beyond the Distributor's control.*
>
> *2.1.2 Purchase Price of Vehicles*
>
> *To fix from time to time the prices of the Vehicles payable by the Dealer to the Distributor, which price shall take immediate effect and be binding as at the time that they are notified to the Dealer and the Dealer shall not be entitled to claim for any rebate or compensation or reduction of price or prices so fixed by the Distributor.*
>
> *...*

3.1 The Dealer hereby agrees with the Distributor as follows:-

3.1.1 Sales at Standard Pricing

To sell the Vehicles only at the approved standard price issued by the Distributor to the Dealer in the manner as provided in Clause 2.1.3 hereto. The Dealer further agrees, covenants and/or undertakes with the Distributor that the Dealer shall not offer any discounts in respect of the Vehicles unless the Dealer shall have obtained the Distributor's prior written approval.

...

3.1.4 Delivery of Vehicles

Upon such payment having been made by the Dealer to the Distributor, the Dealer shall take delivery of the Vehicles immediately from such location of the Distributor as the Distributor may designate and in accordance with the Distributor's procedural guidelines. All costs and expenses relating to the taking of delivery of the Vehicles by the Dealer, including insurance coverage, transport and the procurement of trade plates, shall be solely borne by the Dealer.

3.1.5 Failure in Payment

In the event of failure of the Dealer to make payment to the Distributor within three (3) working days of the appointed time and date fixed for delivery in accordance with Clause 3.1.4 above of the stocks of the Vehicles allocated to the Dealer, the Distributor shall be at liberty to deal with such Vehicles as it thinks fit without any liability to the Distributor.

(emphasis added).

[23] Firstly, the dealership agreement is a commercial contract and should be interpreted in a commercially sensible manner - please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at [10].

[24] I have perused the dealership agreement, in particular the clauses stated in the above para. [22]. Construing the dealership agreement in a commercially sensible manner, the dealership agreement does not provide, either expressly or by necessary implication, that the first defendant shall retain property in the cars until and unless the first defendant is paid in full for the cars by the plaintiff. In other words, the dealership agreement does not have a *Romalpa* clause which vests ownership of the cars in the first defendant until the plaintiff has paid in full for the cars.

Effect Of ss. 19(3) And 20 SGA

[25] I am of the view that ss. 19(3) and 20 SGA (as explained in the trilogy of cases cited in the above para. [21] apply to the sale as follows:

(i) the dealership agreement is an "unconditional contract" for the sale of the cars by the first defendant to the plaintiff in the sense that property in the cars has not been retained by the first defendant - please see the above paras. [22] to [24];

(ii) the cars are "specific goods" within the meaning in s. 2 SGA; and

(iii) the cars are in a "deliverable state" as defined in s. 2 SGA.

As the three conditions stipulated in s. 20 SGA have been fulfilled in this case, "property" (as understood in s. 2 SGA) in the cars would pass to the plaintiff "when the contract is made". Hence, the property in the cars has passed from the first defendant to the plaintiff by virtue of ss. 19(3) and 20 SGA.

First Defendant Is Deemed To Have Notice Of Floating Charges

[26] Upon registration of the floating charges with the ROC, the following cases have decided that the public, including the first defendant, is deemed to have notice of the floating charges:

(i) in the Court of Appeal case of *Tan See King & Anor v. Anata Knitting Industry (M) Sdn Bhd* [2012] 1 LNS 252; [2013] 2 MLJ 284, at 288, Anantham Kasinather JCA decided as follows:

> **On the particular facts of this case, we are satisfied that this registration of the earlier debentures with the Companies Commission sufficed to serve as sufficient notice of the existence of the fixed charge in favour of the respondent**.
>
> (emphasis added);

(ii) in the High Court case of *Malaysian International Merchant Bankers Bhd v. Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2)* [1998] 4 CLJ Supp 32, at 46, Abdul Malik Ishak J (as he then was) held as follows:

> *As I said the debenture dated 23 October 1993 was duly registered with the registrar of companies. There was no reason as to why the 2nd defendant should not have notice about the charge under the Companies Act 1965 in favour of the plaintiff.*
>
> *There was no evidence emanating from the 2nd defendant to show that they had made a search with the registrar of companies. On perusal of encl. 17, para. 3(c) thereof, it can safely be inferred that at all material times the 2nd defendant knew that the holder of the prior registered charge was Bank Bumiputra Malaysia Berhad ["BBMB"] …*
>
> (emphasis added);

(iii) Nallini Pathmanathan J (as she then was) decided as follows in the High Court in *CIMB Bank Bhd v. ZAQ Construction Sdn Bhd* [2013] 1 LNS 230, at [44]:

> 44 …. **The effect of registration under section 108 of the Companies Act 1965 is to notify the world at large of the existence of the plaintiff's security in the assets of Asia Petroleum**.
>
> (emphasis added); and

(iv) it is decided in *NGV Tech Sdn Bhd & Anor v. Ramsstech Ltd & Ors* [2015] 1 LNS 1017; [2015] MLJU 671, at [166], as follows:

> 166. *Section 11(2)(a) [CA (1965)] allows any person, including the Defendants, on payment of prescribed fee, to inspect any document lodged with SSM. Under s. 11(2)(c) [CA (1965)], any person may request for a copy or extract of any document which he or she is entitled to inspect under s. 11(2)(a) [CA (1965)], to be given and certified by the ROC. Accordingly, the Defendants could have easily conducted a SSM search of the Ship Builder and consequently, could have obtained a copy of Form 34 of the 6 Debentures.*
>
> (emphasis added).

The decision in *NGV Tech* has been affirmed by the Court of Appeal.

Whether The Cars Fall Within Ambit Of Floating Charges

[27] It is not disputed that when a company creates a debenture over the company's assets, the debenture holder is a secured creditor of the company - please see the Court of Appeal's judgment delivered by Azhar Ma'ah JCA in *AIMB Marketing Sdn Bhd & Ors v. Malaysian Trustees Bhd & Ors* [2010] 1 LNS 551; [2011] 5 MLJ 210, at 214.

[28] Section 4(1) CA (1965) defines a "debenture" to include "debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not".

[29] In *NGV Tech*, at [73], I have referred to the description of a fixed charge and a floating charge given by Lord MacNaghten in the House of Lords in *Illingworth v. Houldsworth & Anor* [1904] AC 355, at 358 as follows:

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. *A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp*.
>
> (emphasis added).

[30] Regarding the construction of debentures, I have following Singapore cases in *NGV Tech*, at [74] and [75], as follows:

> 74. *I derive assistance from the following 2 Singapore cases on how to construe a debenture*:
>
> (a) *Chao Hick Tin JC (as His Lordship then was) decided as follows in Re Lin Securities Pte Ltd*, at pp. 140, 141, 142, 143 and 144:
>
> *No particular form of words is necessary for the purpose of creating a charge. Any written instrument showing the intention of the parties that a security should be thereby created would suffice although it contains no general words of a charge: see Fisher & Lightwood on Law of Mortgages (9th edn) at p. 13 ...*

A The next question for determination, which is the key question, is whether the charge created is a fixed charge or a floating charge.

Generally, a charge on all the property, both present and future, will create a floating charge. So will a charge upon all the property now belonging or hereafter acquired by the company (see Palmer on Company Law Vol. I, 23rd Ed. Paragraph 44-06). A charge over stock in trade and book debts is normally a floating charge. But there is no magic in any particular set of words. A floating charge may be created without resort to such classical words and expressions as "present or future property" or "undertaking"....

B

It is clear that whether an instrument creates a fixed or a floating charge does not necessarily depend on the label given to it or a particular set of words used by the parties ...

C

In construing the LOH [Letter of Hypothecation], I am mindful of the fact that the court is not entitled to rely upon anything which any party subsequently did or said ...

Counsel for the liquidators has quite rightly conceded to the submission made by Mr. Lloyd [learned Queen's Counsel for the 6th and 16th defendants] that subsequent conduct of the parties should not be relied upon to construe the LOH. But, as the authorities indicated, surrounding circumstances would be relevant and could be taken into account ...

D

Accordingly subjective evidence of the intention of the parties is not admissible, but the court can properly have regard to what has been called the matrix of fact, i.e. the extrinsic circumstances surrounding the transaction including the conduct of the parties at the time the contract was entered into.

E

...

It seems to me that one should not determine the effect of the LOH wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction. First was of course the business of the company itself, the stockbroking business. I think this court is quite entitled to take judicial notice of what this line of business involved and how such business was transacted, i.e. the buying and selling of shares on behalf of clients.

F

G

(emphasis added); and

(b) in *Re EG Tan & Co Pte Ltd, Wong Tui San & Ors v. Chase Manhattan Bank NA* [1991] 3 MLJ 301, at 305, Lai Kew Chai J held as follows in the Singapore High Court:

H

The first question is simply but most importantly in this case one of construction of the share memorandum as to the intention of the parties in relation to the respondents' security in the shares deposited and to be deposited on and as from 26 August 1982. This task has to be undertaken by first and foremost ascertaining the ordinary meaning of the words used in the share memorandum against the 'factual matrix' or background of the transactions

I

and eschewing in the process of construction matters dehors the share memorandum such as the subjective wishes or intent of either party before the agreement was signed or their subsequent conduct: see Re Lin Securities Pte Ltd [1988] 2 MLJ 137 at pp 137 and 143E–144G.

(emphasis added).

75. I am of the view that despite:

(a) the definitions of "debenture" in s. 4(1) CA and s. 2(1) CMSA;

(b) the meaning of "charge" given in s. 4(1) CA; and

(c) previous cases which have explained the meaning of a "debenture", "charge", "fixed charge" and "floating charge"

- the meaning and effect of a "charge", "fixed charge" and "floating charge" as provided in a particular "debenture", is a question of construction of the debenture in question. Based on Re Lin Securities Pte Ltd and Re EG Tan & Co Pte Ltd, the interpretation of a debenture:

(i) depends on the ordinary meaning of the actual words used in the debenture. The label given by the parties may not be conclusive; and

(ii) the factual matrix at the time of the creation of the debenture, namely the extrinsic surrounding circumstances regarding the execution of the debenture, may be considered in construing the debenture. The factual matrix concerning the creation of the debenture includes:

(iia) the conduct of parties at the time of the creation of the debenture; and

(iib) *the nature and scope of business conducted by the parties at the time of the execution of the debenture.*

The construction of the debenture cannot take into account the following matters:

(1) *the parties' subjective intention; and*

(2) *the statement and conduct of the parties after the execution of the debenture.*

(emphasis added).

[31] The following clauses in the first debenture are relevant in this case:

SECTION 2.01 *DEFINITIONS*

"Charged Assets" means all the Borrower's stock of motor vehicles financed by the Financier, both present and future including but not limited to the said vehicles rights title interest that may now or hereafter be charged or otherwise secured in favour of the Financier by and under or pursuant to this Debenture and the proceeds of the security constituted by or pursuant to this Debenture and reference to the "Charged Assets" includes reference to each and every part thereof;

SECTION 5.01 FLOATING CHARGE

As a continuing security for the discharge of all obligations and liabilities and the payment of all principal moneys interest and all other charges costs and expenses owing and incurred by the Borrower to the Financier in connection with the Facility and/or under this Debenture, the Borrower as beneficial owner hereby charges to the

Financier by way of a first floating charge on all the Charged Assets of whatever description now or hereafter belonging to the Borrower financed by the Financier under the Facility including the Motor Vehicles referred to in Section 3.01 hereof ...

SECTION 5.05 CONTINUING SECURITY

The security herein created is expressly agreed and declared by the Borrower to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Financier by the Borrower ...

(emphasis added).

[32] The second debenture has the same provisions as the definition of "charged assets" and s. 5.05 of the first debenture. Section 5.01 of the second debenture is substantially similar to s. 5.01 of the first debenture.

[33] Based on cases regarding the interpretation of debentures as explained in the above para. [30], I am of the following view:

(i) the plaintiff owns the property in the cars (please see the above paras. [19]- [25]. The cars (owned by the plaintiff) would fall within the wide definition of "charged assets" in the debentures; and

(ii) the cars were acquired by the plaintiff after the execution and registration of the floating charges with ROC. Nonetheless, the cars would form part of the charged assets which "hereafter" belonged to the plaintiff under s. 5.01 of the debentures. Furthermore, the floating charges are a "continuing security" pursuant to s. 5.05 of the debentures and would include the cars which had been purchased by the plaintiff after the execution and registration of the floating charges with ROC.

[34] As the cars fall within the wide purview of the floating charges, the bank (not the first defendant) is entitled to the cars.

Bank Is Not Bound By Dealership Agreement

[35] The bank is not a party to the dealership agreement. Based on the doctrine of privity of contract, the bank is not bound by the dealership agreement - please see the Privy Council's decision delivered by Lord Wilberforce in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, at 174 (an appeal from Malaysia).

Costs

[36] Order 17 r. 8 RC provides as follows:

Subject to the foregoing rules of this Order, the Court may in or for the purposes of any interpleader proceedings make such order as to costs or any other matter as it thinks just.

(emphasis added).

[37] In *Peter Yip Shou Shan v. George Kent (M) Bhd & Anor* [2002] 2 CLJ 205, at 208, Abdul Aziz Mohamad J (as he then was) decided as follows in the High Court:

> *It is said at p. 168 of Mallal's Supreme Court Practice, 2nd edn, vol. 1, 1983, that "Where a person holds any money, goods or chattels which he does not claim or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong ...". That being the nature of the relief by way of interpleader, an applicant for relief, in a proper application, should, in principle, not be liable to pay costs but should instead be paid his costs by either of the claimants, because it is their conflicting claims that have compelled him to seek the relief. The claimant liable to pay the costs of the applicant should be the claimant who fails in the claim, who should also bear the costs of the successful claimant.*
>
> *In this case, as I said earlier, if the senior assistant registrar had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It is only when the application is dismissed that the applicant should be liable to pay costs.*
>
> (emphasis added).

[38] I am of the following view regarding the court's power under O. 17 r. 8 RC to award costs for interpleader proceedings:

(i) the court has a wide discretion to award costs pursuant to O. 17 r. 8 RC as is clear from the words "as it thinks just" in that provision;

(ii) cases regarding costs under O. 17 r. 8 RC, as for all other cases on costs, are premised on the exercise of the court's discretion. The exercise of such a judicial discretion is dependent on the particular facts of the case at hand. Hence, previous cases on costs cannot constitute binding legal precedents from the view point of the doctrine of *stare decisis*;

(iii) if an interpleader is rightly commenced, generally, the court may order costs of the interpleader proceedings to be paid by an unsuccessful claimant to:

(a) the party who commences the interpleader proceedings; and

(b) the successful claimant; and

(iv) even if an interpleader is rightly filed, exceptionally, the court may deprive the party who files the interpleader of costs of the interpleader proceedings and may even order the interpleader to pay such costs to all the claimants. This case demonstrates one of the exceptions.

[39] In the present case, despite the fact that this interpleader is rightly commenced by the plaintiff, I exercise my discretion under O. 17 r. 8 RC to order the plaintiff to pay costs of this OS to both the first defendant and the bank. This exercise of discretion is based on the following exceptional circumstances:

(i) the plaintiff had breached the dealership agreement by not paying the first defendant for the sale of the cars;

(ii) the plaintiff had not only defaulted on the facility but had also removed the cars from the showroom without the bank's consent. The plaintiff did not even have the candour to reply to the bank's letter dated 23 April 2018. Lastly, the bank's police report had been lodged against the plaintiff;

(iii) the first defendant and the bank are blameless in this case; and

(iv) the plaintiff's above breaches had caused loss to the first defendant and the bank.

Summary Of Court's Decision

[40] In brief:

(i) a commercially sensible construction of the dealership agreement does not show that the dealership agreement has a *Romalpa* clause wherein the first defendant retains property in the cars until and unless the first defendant is paid in full for the cars by the plaintiff;

(ii) pursuant to ss. 19(3) and 20 SGA, the property in the cars has been transferred from the first defendant to the plaintiff when the sale contract is made;

(iii) the first defendant is deemed to have notice of the floating charges which have been registered with ROC;

(iv) the bank is entitled to the cars because the cars fall within the wide ambit of the floating charges; and

(v) the court exercises its discretion under O. 17 r. 8 RC to order the plaintiff to pay costs of this OS to both the first defendant and the bank due to the exceptional circumstances of this case.