

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA

CIVIL SUIT NO: 22NCVC-317-06/2014

BETWEEN

- 1) RAM KUMAR A/L GOPAL RAM ... PLAINTIFFS  
2) PUSPARANI A/P SELVARAJU

AND

- 1) RAM KAILASH A/L GOPAL RAM ... DEFENDANTS  
2) SAMIK CORPORATION SDN BHD  
3) ALLIANCE BANK MALAYSIA BERHAD

GROUND OF JUDGMENT

(Enclosure 27)

**The Application**

1. These are my grounds in respect of an application by the First Defendant (“D1”) to strike out the Writ and Statement of Claim dated 8 July 2014 under Order 18 Rule 19 (1)(b) and/or (c) and/or (d) and/or under Order 92 Rule 4 of the Rules of Court 2012 (“ROC”).

## The Parties

2. The following facts are taken from the Amended Statement of Claim (“the ASOC”) :

2.1 D1 is the younger brother of the First Plaintiff (“**P1**”). The Second Plaintiff (“**P2**”) is the wife of P1 and brother in law of D1;

2.2 P1 and P2 run a business through a company known as RP Design Illuminazione (M) Sdn Bhd (“**the Company**”).

2.3 The company provides lighting design consultancy services for developers.

2.4 D1 is a manager in a restaurant;

2.5 The Second Defendant (“**D2**”) is a licensed developer and were the developers of an apartment known as X2 Residency consisting of 334 units of apartment in Block A and 342 units of apartments in Block B; and

2.6 The Third Defendant (“**D3**”) is a licensed bank.

## The Background

3. According to the ASOC, D2 had shown P1 and P2 a four bedroom apartment unit in X2 Residency and which had a floor area of 2415 square feet. The apartment unit is described as Lot A-16-07 together with Accessory Parcels No. L2-244, L3-115 and L3-136 (collectively known as **“the apartment”**). The price of the apartment was RM789,800.00 (**“the purchase price”**) together with various incentives as described in paragraph 5(a) to (e) of the ASOC.
4. P1 and P2 claim that they had intended to purchase the apartment and had sought to obtain 90% financing from various financial institutions but were unable to do so due to the fact that P1 and P2 already had two subsisting housing loans and the maximum financing that they could obtain from a financial institution was 70% of the purchase price.
5. Also, P1 had issues with a credit card company and had been **“blacklisted”** by the credit card company.
6. However, despite the fact that they could not get 90% financing, P1 and P2 were nevertheless very keen to buy the apartment. As such, P1 and P2 had allegedly entered into an agreement with D1 and the terms were as follows :

- “8.1 Defendan Pertama hendaklah membuat tempahan untuk Unit Apartment tersebut dengan bayaran tempahan sebanyak RM5,000.00 yang dibayar oleh Plaintiff Pertama dan Plaintiff Kedua;
- 8.2 Defendan Pertama hendaklah mendapatkan pinjaman 90% atas nama Defendan Pertama daripada institusi kewangan untuk melengkapkan penjualan dan pembelian Unit Apartment tersebut;
- 8.3 kesemua perbelanjaan yang ditanggung (jika ada) oleh Defendan Pertama dalam memohon pinjaman perumahan 90% tersebut akan ditanggung oleh Plaintiff Pertama dan Plaintiff Kedua;
- 8.4 kesemua bayaran yang terhutang/perlu dibayar terhadap pinjaman perumahan 90% tersebut akan ditanggung keseluruhannya oleh Plaintiff Pertama dan Plaintiff Kedua tanpa apa-apa sumbangan langsung daripada Defendant Pertama;
- 8.5 Defendan Pertama hendaklah memegang Unit Apartment pada amanah bagi Plaintiff Pertama dan Plaintiff Kedua dengan mutlak “absolutely”.

(see paragraph 8.1 – 8.5 of the ASOC)

7. Consequently by letter of offer dated 11 January 2013, D3 had offered a personal loan of RM39,490.00 to D1 which represented 5% of the purchase price and a housing loan of RM671,330.00 representing 85% of the purchase price. Both these loans were offered by D3 to D1 to enable the latter to purchase the apartment.
  
8. It is alleged that on 15 November 2013, D1 had executed a Sale and Purchase Agreement with D2 ("**the SPA**") to purchase the apartment and that this was done in the presence of P1 and P2. At the same time, P1 and P2 had allowed D2 to transfer the booking fee which had allegedly been paid by P1 and P2 into D1's account and for the same to be utilized towards the purchase of the apartment. (See para 11 of the ASOC).
  
9. On 13 December 2013, D1 had sent a cheque for RM39,490.00 (representing 5% of the purchase price) to P2 to enable P2 to pay the sum to D2 towards the purchase of the apartment. P2 deposited the cheque into D1's sale and purchase account with D2 and upon clearance of the cheque, P2 issued a cheque for the same amount and deposited it into D1's account at Affin Bank Berhad. (See para 12 of the ASOC)
  
10. According to the Plaintiffs, the cheque for RM39,490 (5% of the purchase price) which was issued by D1 came from the personal loan that was granted by D3 to D1.

11. Further, it is alleged that the balance of the purchase price of RM671,330.00 (85% of the purchase price) was disbursed progressively by D3 to D2 in accordance with the SPA.
12. Based on the matters as abovestated, it is alleged that P1 and P2's rights and interests under the SPA concerning the apartment are held on trust by D1 for and on behalf of P1 and P2. (See paragraph 15 of the ASOC).

### **D1's alleged conduct**

13. According to paragraph 16 of the ASOC, on or around 15 May 2014, in a telephone conversation between D1 and P1, the former had denied or reneged on the agreement which he had with P1 and P2 and alleged that the apartment was absolutely owned by him and had offered to transfer all rights and interests under the SPA to P1 and P2 for payment of a sum of RM150,000.00.
14. As such, P1 and P2 filed the instant action and prayed for the following reliefs :
  - i. *pengisytiharan bahawa semua keseluruhan hak dan kepentingan dalam dan kepada Unit Apartmen tersebut sebagaimana termaktub di dalam Perjanjian Jual Beli bertarikh 15/11/2013 tersebut berkenaan dengan Unit Apartment tersebut adalah dipegang oleh Defendan Pertama di atas amanah bagi Plaintiff Pertama dan Plaintiff Kedua dengan mutlak;*

- ii. *suatu perintah bahawa tertakluk kepada Plaintiff Pertama dan Plaintiff Kedua membayar dan/atau menyelesaikan semua jumlah wang yang terhutang oleh Defendan Pertama kepada Defendan Ketiga yang timbul daripada pinjaman yang diberikan oleh Defendan Ketiga berhubung dengan Unit Apartment tersebut, Defendan Pertama hendaklah melaksanakan penyerahhakkan hak mutlak dalam cara yang sepatutnya ke atas keseluruhan hakmilik dan kepentingan di dalam dan kepada Unit Apartment tersebut sebagaimana tertera di dalam Perjanjian Jual Beli bertarikh 15/11/2013 tersebut berkenaan dengan Unit Apartment tersebut kepada Plaintiff Pertama dan Plaintiff Kedua atau kepada sesiapa yang diarahkan oleh Plaintiff Pertama dan Plaintiff Kedua;*
  
- iii. *satu injuksi yang menghalang Defendan Pertama, sama ada dengan sendiri atau melalui ejennya atau pengkhidmatnya atau apa-apa jua cara, daripada berurusan dan/atau melupuskan semua atau apa-apa hak keseluruhan dan kepentingan dalam dan kepada Unit Apartmen tersebut sebagaimana termaktub di dalam Perjanjian Jual Beli bertarikh 15/11/2013 tersebut berkenaan dengan Unit Apartment tersebut;*
  
- iv. *apa-apa relif selanjutnya atau lain-lain relif yang mana Mahkamah yang Mulia difikirkan patut dibuat;*
  
- v. *kos hanya terhadap Defendan Pertama dan tidak ada perintah kos terhadap Defendan Kedua dan Defendan Ketiga.”*

15. It is clear from the ASOC that P1 and P2 are making no allegation against D2 and D3 and that they are accordingly nominal Defendants and no costs are being sought against these Defendants. Thus, the dispute is purely between P1/P2 and D1.

### **Striking Out Application**

16. D1 maintains that this action ought to be struck out as there is no basis for P1/P2 to assert that there is any sort of trust arrangement. D1 maintains that whatever monies that were paid by P1 and P1 were initially intended as a wedding gift and later these were regarded as a loan, which D1 had in any event, fully settled.
17. D1 maintains that contemporaneous telephonic (“**WhatsApp**”) messages that were exchanged between P1/P2 and D1 demonstrate that the payments that were made by P1/P2 were intended to be a wedding gift to D1 and which later metamorphosed into a loan. These messages are reproduced hereinbelow. In these messages, the name “Jenny” refers to P2, “Rennick” to D1 and “Boy Annai” or “Anne Ram Kumar” to P1 :

*“18/09/2013 12:21 PM: Jenny: Pandai la tu....*

*19/09/2013 11:02 AM: Jenny: Mrng... Once wake up call me/annai.  
Will update u of ur dream house  
X2... Hv good new 4 u... .. I  
personally spoken to developer ...*

*...*

*19/09/2013: 02:38PM: Jenny: Annai sd if u really want to buy ur  
dream house, annai will talk to  
developer big boss to included ur*



*S&P lawyers fees in.. So u no need to take out all ur saving.. Just pay 5k & get ur loan approve for 90% & ready urself to move in happily.....*

...

*19/09/2012: 2.58PM: Jenny: If everything ok then go & make booking... I told them to hold the 3 units rdy...*

*19/09/2013: 2.59PM: Jenny: All de best!*

*19/09/2013: 3.02PM: Rennick ram: Thanks anni for the help*

*19/09/2013: 3.05PM: Jenny: Don't say that, v r happy 4 u.....*

*19/09/2013: 3.06PM: Jenny: Actually annai really sayang u, lash....*

....

*23/09/2013: 3.44PM: Jenny: Actually Annai very happy that v managed to get u the 10% off.... Happy that u own the hse, which something big in ur life...*

*23/09/2013: 3.48PM: Rennick Ram: Ya anni I also didn't thought that I'm going to get one. Only thing I always wanted to have is a own house. Thanks to both you and annai.*

...

*26/09/2013: 6.08PM: Rennick ram: Annai is not putting me in trouble I'm lucky cause both of you really guide me and help me anni. I won't forget all the thing. It's good*

*exposer for me or else I won't move on anni. Parents mentally always think that we are small kid which we know all of us grown up. Im happy that I'm getting what I dream from both of you anni. Ask annai don't be sad.*

...

**26/09/2013: 6.54PM: Jenny: Ok la, annai sd once loan approve v go makan besar.... Celebrate for good prosperity start for u. May all end with well success.**

...

**07/11/2013: 12.24AM: Jenny: Can not sd like tht....Now u got ur life n house n dream**

**07/11/2013: 12.24AM: Jenny: Must always ..**

....

**12/9/2013: 1.51PM: Anne Ram Kumar: Kailash, pls arrange the balance payment by Wednesday. Thx**

**12/9/2013 2.00PM Anne Ram Kumar: You say arrange 15<sup>th</sup> Nov.**

**12/9/2013 2.16PM ..... : Ok Annai I will do asap annai so sorry**

**12/9/2013 3.35PM: Anne Ram Kumar: Bank and developer say your loan already disperse to your account 1 week ago and told my wife.**

12/9/2013 3.25PM: Anne Ram Kumar: They confirm that since last week.

12/9/2013 3.28PM: .....: Ok Annai I didn't check so sorry cause stuck with laundry.

12/9/2013 4.05PM: Anne Ram Kumar: Total rm39,490.00 is ur 5% amt which RP Design Illuminazione had paid on behalf of you to developer on ur S & P signing session. You had paid up RM11,400.00 as of todate to my wife Maybank account. Balance amount to pay RM 28,090.00  
 RM39,490.00 – 5%  
 (RM11,400.0) – paid  
 -----  
 RM28,090.00  
 Amount Due to RPDI  
 Thanks, please arrange this payment by Wednesday as I have all my staffs salary & other commitments to release. Though I felt hesitate to remind you but I have given no choice when u remain silent.

...

16/12/2013 12.25PM: **Jenny: Now got big prob in ur x2 down payment .... Annei is settle ur 10% down payment by contract RP project free design for developer**

.....

16/12/2013 12.46PM: **Rennick ram: Anni what problems with 10% I thought they said all included anni.**

...

16/12/2013 12.46PM: **Rennick ram: Anything from my side anni I must do**

16/12/2013: 12.46PM: **Jenny: Now, annei is paying ur 10% down payment by contra RP project free design for developer .... 80K**

16/12/2013 12.47PM **Rennick Ram: Oh god**

16/12/2013 12.46PM: **Jenny: Kailash, am only ur sister in law... If I am a bad person, today u won't be buying house or rather annei can help u to contra project u without telling u these problem...**

16/12/2013 12.51PM: **Jenny: God won't help u lash.... Ur god is ur brother Ram Kumar.**

...

16/12/2013 12.50PM: **Rennick ram: Annai anni I put you both in a lot of problems. I'm so sorry**

16/12/2013 12.51PM: **Jenny: Don't worry, annei & me decided that 10% down payment is our advance wedding gift for u...**

16/12/2013 12.52PM: **Jenny: As long as u r happy, v will happy for u...**

16/12/2013 12.52pm: Rennick Ram: Now I'm sad anni cause I put both in this situation

16/12/2013 12.53PM: Jenny: That's y, I didn't tell u tht developer past ur S & P to RP..... Not to u.

16/12.2013 12.53PM: Jenny: No emotion here, only action take place....

16/12/2013 12.54PM: Jenny: V supposed to tell u abt ur advance wedding gift past 2 week in Ben's bfast appointment but u didn't turn up....

16/12/2013 12.55PM: Jenny: Now u r talking JJ

16/12/2013 12.56PM: Rennick Ram: I understood anni. That was my mistake if I wasn't in police station. And inform annai won't be up set with me

16/12/2013 12.59PM: Jenny: Pls bare with me by end of this moths, once agreement btw developer & RP settle. I courier ur S & P to u .... Don't worries, x2 is ur house 100% under ur single name got nothing to do with RP name 0.01% ..... only things, RP is hold 100% responsible on ur 10% + lawyer fees... By contra project fees.

16/12/2013 1.01PM: Jenny: Yes, at least u shld hv inform...But it's ok. V r so use too it lash.

16/12/2013 1.09PM: Rennick Ram: Anni I didn't do by purpose anni

16/12/2013 1.11PM: Jenny: Nvm...

16/12/2013 1.12PM: Rennick Ram: I'm sorry anni and annai

28/12/2013 2.07PM: Jenny: Kailash, ur S&P is with us...Pls collect. Thx."

## P1 asserts ownership over the apartment

18. However, in an attempt at countering the inferences that are to be drawn from the messages referred to above, counsel for P1 and P2 has referred to P1's WhatsApp message on 16 March 2014 at 10.25 am which reads as follows :

*“16/03/2014 10.25AM: Boy Annai: Warning & Reminder: In the event I ever heard my name, my wife's name, my kids names, my business or my travelings and bad mouthing are being quoted as an excuse or in any involvement in current and future affair. I will confronts directly with any parties with evidences that I have. Never take advantage of my silent and setback. Mind it, I of the day I will make myself to be in PD to clarifies what ever you had quoted and your past life, I have ears and eyes everywhere. As for my house X2, I will be selling of and none has the right to talk about it anymore as I'm the pay master and owner. I will see you in court even you need to be behind the bars. I will turn back your life to what you were 8 years back when you are with mother. This is your mothers wishes and never challenge me. You had start 'Business" with me and let me finish the deal for you. Don't waste your time to reply this text. This is an order.”*

## **Analysis/Findings**

19. I have perused the pleadings and the affidavit filed by D1 with respect to the application to strike out. Of course, it is true that the Plaintiffs have not filed an affidavit in reply to D1's application to strike out. However, despite the absence of an affidavit in reply by the Plaintiffs, it is my view that in order for D1 to succeed, the application to strike out has to be sustained on clear and compelling grounds, which naturally takes me to the critical matter of the WhatsApp messages.
  
20. On the one hand, I can see clearly that there was initially a great amount of respect and deference which was shown by D1 to P1 and D1 acknowledged P1's help in enabling the former to purchase the apartment unit. Also, P1's message demanding for the return of the part payment of the purchase price lends credence to D1's assertion that whatever monies that were paid by P1/P2 were by way of a loan and dilutes the suggestion that there was a trust arrangement. The messages show that initially that P2 expressed her husband's (P1's) happiness that D1 was able to buy an apartment with P1's help for which D1 was eternally grateful.
  
21. The tone and content of all the WhatsApp messages appear to suggest that P1 was merely helping his younger brother (D1) to purchase an apartment and had even asked for the monies to be paid back to him as he (P1) had to pay staff salaries and other office related expenses etc.

22. According to D1, he duly repaid the sum of RM39,400.00 to P1. See paragraph 17 (n) and (o) of the Defendant's affidavit in support of Enclosure 16, which has not been rebutted by P1 and P2.
23. However, although there seems to be some basis for the assertion that there was no trust arrangement and that it was just a loan by P1, it is necessary for me to also consider P1's ranting message to D1 where he (P1) stated that the apartment was his. It is significant that D1 did not reply to this message and debunk or disabuse the assertion by P1 that it was his apartment.
24. It is trite that an action will only be struck out where it is plain and obvious that the claim is unsustainable. In ***Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd [1993] 4 CLJ 7***, the Supreme Court held that an application to strike out the claim will not be allowed unless it is plain and obvious that the Plaintiffs' claim is unsustainable. The Court said,

*“[1] The principles upon which the Court acts in exercising its power under any of the four limbs of O.18 R.19 (1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable”.*



25. From the evidence alluded to above, it is my view that the facts are not so clear cut that P1/P2 have totally no chance of succeeding at the trial. In my view, there is at the very least or very minimum a controversy or conflict of evidence as to what exactly was the nature of the arrangement between P1/P2 and D1. Hence, it is valid to ask, whether P1/P2 had paid these monies as a gift or loan or was D1's name being used such that he was merely to hold the apartment on trust for P1/P2.
26. On the facts, as presented by way of D1's affidavit, I cannot conclude that the factual matrix is free from controversy. I am particularly troubled by P1's message dated 16 March 2014, which was not replied to or rebutted by D1. To me, that suffices to create a controversy and calls for an explanation by both sides and a trial is the only way that the conflict or controversy may be resolved.
27. In law, when there is some factual controversy then striking out is patently impermissible. In ***Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457***, the Court held as follow :

*“In Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, Federal Court, Gopal Sri Ram decided that the power to summarily strike out a pleading must be sparingly exercised, and in respect of the philosophy that underlies the exercise of that power, we can do no better than to quote from the judgment of Mohamed Dzaidin SCJ in Bandar Builder Sdn Bhd v United Malayan Banking Corp. Bhd:*

*“This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, **the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out**”.*

28. No doubt, the WhatsApp messages (save for P1’s message dated 16 March 2014) cumulatively render the Plaintiffs’ claim weak and quite shaky but on the other hand, there is a compelling need for both sides to explain the real nature of the arrangement and why D1 did not rebut P1’s assertion on 16 March 2014 that he (P1) was the paymaster and owner of the apartment.
  
29. In paragraph 13 of the Defence filed on behalf of D1, it is stated that D1 has been paying all the loan installments to D3. However, according to the ASOC, P1 and P2 are to pay all the loan installments. At this stage, it cannot be determined one way or the other as to who has been paying all the loan installments to D3. There is obviously a certain degree of conflict on this point, quite apart from the other matters which have been discussed above.

30. In the circumstances, based on the principles of law alluded to above and the controversy which emanates, *inter alia*, from the WhatsApp messages referred to above, it is my view that this is not a plain and obvious case for striking out. As such, D1's application to strike out the Writ and Statement of Claim is hereby dismissed with costs fixed at RM2,000.00 to be paid by D1 to P1 and P2.

Order accordingly.

Date: 10 April 2015

-sgd-

**S. Nantha Balan**  
**Judicial Commissioner**  
**High Court Kuala Lumpur**  
**Counsel:**

**Counsel:**

For the Plaintiffs : Mr. Rajadevan ; Messrs Rajadevan & Associates

For the Defendants : Mr. Sheelan Arjunan ; Messrs Sheelan Arjunan & Co

**Statute:**

Order 18 Rule 19 (1)(b) and/or (c) and/or (d) Rules of Court 2012

Order 92 Rule 4 of the Rules of Court 2012

**Cases referred to :**

*Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corporation Bhd*  
[1993] 4 CLJ 7

*Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors*  
[2000] 2 CLJ 457