to emphasize that probate actions, whether contentious or non-contentious, should comply with Order 71 and Order 72 of the Rules of the High Court 1980.

After issuing the writ in December 1985, the respondent took out a summons in May 1986 applying for an interlocutory injunction against the administrator and administratrix of his deceased father's estate, appointment of a receiver and other ancillary relief. The learned judge made the order in terms.

In granting the interlocutory injunction, the learned judge adopted the test propounded by Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*[1] that the pleadings have raised a number of serious questions to be tried. Whilst this test may be valid in ordinary civil proceedings, it is submitted by learned counsel for the administrator and administratrix (hereinafter referred to as the appellants) that it is not a proper test to be adopted in probate actions, inasmuch as the administrator and/or administratrix is appointed by the court and subject to the control of the court. He argues that a higher test ought to be used. Learned counsel for the respondent seems to agree with this submission. In our judgment, a strong *prima facie* case is required to induce a court to grant an interlocutory injunction against an administrator or administratrix and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud and immediate danger of loss, for the court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances.

Applying this higher standard of test to the facts of this case, it is plain that the learned judge had exercised her judicial discretion based on the wrong principle. Learned counsel for the respondent had contended that although the learned judge had not applied the test correctly, there was nevertheless ample affidavit evidence to support that a strong *prima facie* case had been made out against the appellants and that the learned judge was quite justified in granting the interlocutory injunction and appointing a receiver to manage the estate of the deceased. This contention was disputed by learned counsel for the appellants.

We have carefully read and considered the affidavits filed herein by the respective parties to these proceedings. We are unable to agree with the submission of learned counsel for the respondent that a strong *prima facie* case had been made out against the appellants. True, there were a number of allegations of mismanagement and other acts of impropriety made by the respondent but they were strongly denied by the appellants. On the other hand, there was the claim of the appellants that the administration of the deceased's estate had already been completed some years ago in November 1979.

For the above reasons, we allow the appeal and set aside the interlocutory injunction and the appointment of a receiver made by the learned judge on 29 September 1986, and order an early trial of this action instead. We would award to the appellants costs in this court only to be taxed. The deposit shall be refunded to the appellants.

Appeal allowed.

Solicitors: *Khana & Co.; Sidek, Zubir, Sulaiman, Nadzir & Partners.*

HOO SEE SEN & ANOR. v. PUBLIC BANK BHD. & ANOR.

[S.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) and Lee Hun Hoe C.J. (Borneo) 8 February & 17 March 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 335 of 1987]

Contract – Building contract – Payment of balance of purchase price – Application for injunction to restrain payment by bank from which loan was obtained – Liquidated damages claimed exceeding amount due for balance of purchase price – Deed of assignment – Interpretation of.

In this case, the appellants had purchased a two-storey link house to be constructed by the second respondent for $145,000. The appellants and the second respondent entered into a purchase agreement under which vacant possession of the house was to be given within 24 months from the date of payment of the booking fee. The house was not completed and no delivery had taken place. The second respondent was therefore liable to pay liquidated damages to the appellants.

To finance the project, the appellants obtained a loan of $100,000 from the first respondent and assigned the benefits under the sale and purchase agreement to the first respondent as security for the loan. After taking the assignment, the first respondent gave an undertaking to the second respondent that it would pay any monies due under the sale and purchase agreement. In this case, there was a balance of the purchase price unpaid.

The appellants sued the first respondent for an injunction to restrain it from paying the second respondent the

money due from the appellants to the second respondent on the ground that a greater sum was due from the second respondent to the appellants. Both sums arose out of the sale and purchase agreement, the first sum being the balance of the purchase price while the second was the amount of liquidated damages for late delivery of the vacant possession. The application of the appellants was refused in the High Court and the appellants appealed.

Held, allowing the appeal: (1) it is clear that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. The appellants are therefore still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement, including the payment of the purchase price;

(2) the payment of the purchase price, which is purportedly due from the appellants, is the liability of the appellants and is not the liability of the first respondent. Under no circumstances was the first respondent bound or even authorized to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorized to do so and this must be for the benefit of the appellants;

(3) the appeal should therefore be allowed and the interim injunction prayed for by the appellants should be issued.

SUPREME COURT.

Ngeow Yin Ngee for the appellants.

Suhendran Sockanathan for the first respondent.

Patrick Chen for the second respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the grounds of decision of the court): In this case, the appellants/plaintiffs sued Public Bank Berhad, the first respondent, for an injunction to restrain it from paying Sedaya Sdn. Bhd., the second respondent, a certain sum of money due from the appellant to the second respondent on the ground that a greater sum was due from the second respondent to the appellant. Both sums arose out of a sale and purchase agreement of a house, the first sum being the balance of the purchase price whilst the second was an amount of liquidated damages for late delivery of vacant possession. The court below refused to issue the injunction requested for.

The facts of this case are set out in the affidavit of the appellants sworn on 8 May 1987. These are as follows.

The appellants purchased a two-storey link house which was to be constructed by the second respondent for $145,000. For this purpose, the appellants and the second respondent entered into a sale and purchase agreement on 18 August 1982 by paying a booking fee of $1,000, subject to various payments including progress payments. According to clause 18 of the sale and purchase agreement, which was only signed on 18 March 1983, the building was to be so constructed that the second respondent had to give vacant possession within 24 months of the date of the agreement, *i.e.* 24 months from the date of payment of the booking fee (18 March 1982). This means that by 17 August 1984, vacant possession should have been handed over to the appellants, but on that date the building was still uncompleted and no such delivery has taken place. Under the same clause, the vendor has to pay liquidated damages at the rate of 10% per annum and these damages had been calculated to amount to $36,309.58 as at 17 February 1987. Under the same clause, the second respondent "shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10% per annum of the purchase price." It is therefore clear that the payment of liquidated damages is due every day from 17 February 1987.

To finance the project, the appellants obtained a loan of $100,000 from the first respondent and assigned the benefits under the sale and purchase agreement to the respondent as security for the loan, because no separate title has yet been issued. The property purchased is still a building lot under an approved layout plan. After taking the assignment, the first respondent gave an undertaking to the vendor, *i.e.* the second respondent, that it would pay any monies due under the sale and purchase agreement. The amount of such money being due in this case is $29,000, of which $21,750 is to be paid upon the delivery of vacant possession; the remainder, being the retention amount, has to be paid as follows, *i.e.* $3,625 at the expiry of six months and another $3,625 at the expiry of twelve months, after the handing over of vacant possession.

It is the contention of the appellants that, since the liquidated damages which the second respondent has to pay to them exceed the amount of the balance of the purchase price for the house payable by them to the second respondent, they are no longer bound to pay any money to the second respondent but instead entitled to the difference. Thus they sued the first respondent for an injunction to prevent the first respondent

from paying the balance in the purchase price over to the second respondent.

The first respondent on the other hand said that they cannot agree to the injunction or to the request of the appellants because it would mean that they will be committing a breach of their undertaking which they have given to the second respondent. But the appellants contended that the first respondent's undertaking was not a valid undertaking.

In our view this matter could be resolved by looking at the deed of assignment executed between the appellants and the first respondent on 7 November 1983. This deed is a very long one, mostly dealing with the rights and obligations regarding the payment of the loan and the management of the property between the appellants and the first respondent. There is not a single clause which deals specifically with the disbursement of the loan. There is nothing in the deed of assignment which either authorized or imposed an obligation on the first respondent to give an undertaking to the second respondent to pay any money due from the appellants to the second respondent. The only clause which dealt with this is clause No. 1, which says "in consideration of the loan of the sum of ringgit one hundred thousand ($100,000) ... to be paid or advanced *for the benefit of the borrowers* (the appellants) by the bank (the first respondent) to the company (the second respondent) (the payment whereof the borrowers *expressly authorize* the bank to make) the borrowers hereby agree covenant and undertake ..." It must be noted, however, that the authority of the first respondent to disburse the loan to the second respondent is "for the benefit of the appellants". Thus payment of the balance of the purchase price to the second respondent, when the latter is under an immediate obligation to pay a bigger sum of money to the appellants, cannot under any circumstances be held "for the benefit of the appellants".

We also observe that clause 4 of the deed of assignment clearly spells out what has been assigned and what has not been assigned. For the sake of clarity, we set out below the wording of this clause, which is as follows:

"4. For the consideration aforesaid the borrowers as beneficial owners hereby absolutely assign to the bank the said property and the full and entire benefit of the sale agreement together with all rights title and interests of the borrowers therein. Provided always that notwithstanding the assignment hereinbefore contained or any other provision of this agreement the borrowers shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrowers expressed and contained in the sale agreement."

It is clear from this clause that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. Because of this, the appellants are still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement. Payment of the balance of the purchase price, which is purportedly due from the appellants, is such liability, which is not the liability of the first respondent, but the liability of the appellants. Thus, under no circumstances was the first respondent bound or even authorized to make such payment and indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the loan sum on behalf of the appellants and is bound to release the money only when authorized to do so, and this must be for the benefit of the appellants.

In view of what we have set out earlier, we think that this appeal should be allowed and the interim injunction prayed for by the appellants' summons-in-chambers dated 8 May 1987 should be issued. We order also that the costs of this appeal and the proceedings in the court below should be paid by both the respondents and we direct that the deposit of this appeal be refunded to the appellants.

Appeal allowed.

Solicitors: *Ngeow & Maurice Gomes; Chooi & Co.; Allen & Gledhill.*