

DOCTRINE OF LACHES AND ITS APPLICATION IN ACTIONS FOUNDED ON CONTRACT IN MALAYSIA

by

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In a remedial contractual action, the limitation period plays an important part before one commences an action against the defaulting party to a contract.¹ The provision of a limitation period to enforce a contract is found in s 6² of the Limitation Act 1953 ('the Act'). By virtue of this provision, one has to commence remedial action either in the form of specific performance or damages within six years from the date of accrual of the cause of action, failing which his action is deemed to have failed and shall be struck out by the court.

Apart from this, at common law and in statutory footing under the Malaysian Limitation Act 1953 (Act 254),³ there is another equitable doctrine that could affect the plaintiff's action. This doctrine is called the doctrine of laches. In short, this doctrine states that if the plaintiff commences an action with unreasonable delay (laches) after the accrual of the cause of action, his action will be defeated.

Meaning of laches

It is observed in cases and authorities that there are several interpretations to the doctrine of laches.

First, there is the definition of laches as found in the statement of the Judicial Committee of the Privy Council in *Lindsay Petroleum Company v Hurd*,⁴ where it is said that the doctrine of laches:

...is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put

1 Section 6(1)(a) of the Limitation Act 1953.

2 However, for specific performance of contract of sale of land contains in s 9 of the Act.

3 In particular, s 32 of the Act.

4 (1874) LR 5 PC 221.

the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.⁵

According to Peh Swee Chin J, albeit this being his personal opinion and no authority was referred to, in *Cheak Kim Ton & Anor v Taro Kaur*:⁶

Laches means ‘something more than a mere delay; it means such delay amounting to acquiescence ... viz there is a complete violation of a right and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent.

According to His Lordship regard must also be had to the change in a defendant’s position which has resulted from a plaintiff’s delay in bringing an action.

These definitions were reinforced by ICF Spray in *Verrall v Great Yarmouth Borough Council*.⁷ He said that:

Laches is established when two conditions are fulfilled. In the first place, there must be unreasonable delay in the commencement or prosecution of proceedings; in the second place, in all the circumstances the consequences of delay must render the grant of relief unjust.

However, to consolidate and cement this definition, Spray added that:

Two further matters should be noted. First, unreasonable delay of the plaintiff may in some circumstances cause prejudice to third persons, rather than to the defendant, and in this event similar considerations apply mutatis mutandis to those that have already been set out here (citing *Lamshed v Lamshed* (1963) 109 CLR 440, at p 453). Secondly, where the defendant has affirmed the material contract after the prejudice or unfairness in question has arisen, it is no longer unjust to grant specific performance on the ground of laches, unless the affirmation has been induced by misrepresentation or some other such consideration inclines the balance of justice against the plaintiff.⁸

By this additional definition, what is understood is that laches also occur where there is unreasonable delay on the part of the plaintiff to institute

5 Ibid, at pp 239–40.

6 [1989] 3 MLJ 252.

7 (1981) QB 202 at p 205.

8 Spray ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages*, Fourth Edition, Australia: The Law Book Company Limited, 1990, p 232.

proceedings against the defendant, and on such delay, a third party has taken a right that concerns the plaintiff through the defendant and on such institution cause injustice that would prejudice the third party.

However, according to Spray, the doctrine of laches, though in the preliminary would be a good defence to the defendant, yet it also would not carry any weight for him if, the defendant had affirmed the material contract after the prejudice, it would not be unjust to grant specific performance⁹ on ground of laches, unless there is misrepresentation or other inequitable factors on the part of the plaintiff which would otherwise be unjust for the court to grant the plaintiff the relief he sought.

Based on these definitions and authorities, what is clear to us is that the plaintiff must commence his action against the defendant with reasonable speed and as expediently as possible or at least with reasonable delay and he should not delay his action so unreasonably that due to the delay, the position of the defendant or the third party has been altered. In such an event, it will be unjust to grant the relief sought by the plaintiff.

However, according to Spray, if the defence of the doctrine of laches is preliminarily successful, the court would without hesitation allow the relief sought by the plaintiff, provided that justice, based on circumstances, warrants them to do so.

A further question could be raised, that is, what would constitute unreasonable delay that would cause injustice to the defendant or the third party? According to the general views,¹⁰ this depends on the facts of each case. The court will look into the conduct of both the plaintiff and the defendant and the circumstances of the case before they can conclude that there is laches. For example, where the plaintiff's action would cause loss of evidence¹¹ if the property has passed through various hands and successive owners have spent money on it, an equity court will not rescind the original wrongful sale of the property, even if it be a sale by a trustee in breach of trust,¹² where delay might cause a situation to arise where the defendant or third parties had reasonably acted to their detriment in reliance on the plaintiff's delay¹³ and where the defendant, meanwhile, loses access to documents of other evidence that substantially affects his ability to defend himself.¹⁴

9 Here, Spray gave an example of an action of specific performance. It is submitted that it could also include a claim for damages or any other equitable relief.

10 Spray, ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages*, Fourth Edition, Australia: The Law Book Company Limited, 1990, at p 446.

11 *Watt v Assets Co* (1905) AC 317 at p 329.

12 *Bonney v Ridgard* (1784) 1 Coz Eq Cas 145.

13 *Watson v Commercial Bank of Australia* (1879) 5 VLR (M) 36.

14 *Watt v Assets Co Ltd* (1905) AC 317.

Statutory provisions

The doctrine of laches in Malaysia is codified in s 32 of the Act which states:

Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence, laches or otherwise.

It is to be noted that even s 6 of the Act mentions the importance of s 32, where it says that:

Subject to the provisions of ss 22 and 32 of this Act, the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

From this provision, it is clear that the limitation period for commencing an action in contract¹⁵ is six years from the accrual of the cause of action. The institution of such an action would be in tatters if there is laches on the part of the plaintiff.

Procedure

In applying the doctrine of laches, one should bear in mind that in order to succeed on this defence, one must expressly plead this defence.¹⁶ This is pursuant to the requirement of s 4 of the Act, which says that:

Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

His plead may either be in the statement of defence¹⁷ and seek the trial of a preliminary issue,¹⁸ or in his summon of chambers to strike off the statement of claim of the plaintiff.¹⁹ If the defendant pleads this in his defence, he has to plead the preliminary issue under O 18 r 11. If it appears to the court that the decision on the preliminary issue substantially disposes of the cause of matter or renders the trial of the cause or matter unnecessary,

15 Section 6(1)(a).

16 This is applied in England in *Murray v Secretary of State of India* English & Empire Digest Vol II para 375 and *Dismore v Milton* (1938) 3 All ER 762.

17 Under O 18 r 11 of the High Court Rules 1980.

18 Under O 33 r 2 of the Rules of the High Court 1980, if it appears to the court that the decision on the preliminary issue would substantially dispose of the cause or matter or render the trial of the cause of matter unnecessary, then the court may act under O 33 r 5 to dismiss the plaintiff's action.

19 Per Donaldson LJ in *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER at pp 965–966. See also per Abdul Malik bin Haji Ahmad J in *Yeo Chu Hui v Lim Cheng Jin (f) & Anor* [1993] 1 AMR at p 748 lines 30–35. However, according to Stephenson LJ in *Riches v Director of Public Prosecution* [1973] All ER at p 941, the court could invoke its inherent jurisdiction to stay or to dismiss an action which is statute barred.

the court may then act under r 5 to dismiss the plaintiff's action. The court will not order a preliminary issue or point of law to be tried '... unless the trial of that issue will result in substantial saving of time and expenditure in respect of the trial of the statement of defence.'²⁰

In case that where he (the defendant) initiates an action to strike off the statement of claim, he should rely on O 18 r 19(1)(b)(d) on the ground that the plaintiff's action is frivolous or vexatious or it is otherwise an abuse of the process of court. He could not invoke r 19(1)(a) on the ground that the plaintiff's action discloses no reasonable cause of action.²¹ This is because the defence of laches bars the remedy and not the claim and it is impossible to say in such cases, that there is no reasonable cause of action.²²

The position in England

This doctrine has been applied in England. However, according to Lord Wensleydale in *Archbold v Scully*,²³ the general view is that this doctrine is applicable only where there are no provisions in the Limitation Act. For example, in the Limitation Act 1939 the normal six-year rule is not expressly applicable to claims for specific performance. Thus, laches may defeat the plaintiff's claim when there has been unreasonable delay.²⁴

Apart from the above, there is an exception to the applicability of this doctrine. The exception is where the plaintiff has already taken possession under the contract and merely seeks to perfect his legal title. This was the case in *Williams v Greatrex*.²⁵ The plaintiff/purchaser instituted proceedings to force the defendant/vendor to perfect the legal title of the land purchased,

20 *Thanaraj all Manikam & Ors v Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82. Where there is a point of law which, if decided one way is going to be decisive of the litigation, then advantage should be taken of the facilities afforded by the Rules of the High Court to have it disposed of at the close of the pleadings or shortly thereafter. This does not prevent a party from raising any other point of law at the trial. A point of law need only be raised in the pleading if the party wishes to proceed with the trial of the point of law as a preliminary issue.

21 *Goh Kiang Heng v Hj Mohd Ali bin Haji Abd Majid* [1998] 1 MLJ 615 per Augustine Paul JC at p 638. See also Per Donaldson LJ in *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER at pp 965-966. However, see per Stephenson LJ in *Riches v Director of Public Prosecution* [1973] All ER, at p 941, where he said that 'on the other point, I am willing to assume that a cause of action which is statute-barred as clearly as the plaintiff's cause of action, nonetheless may be a reasonable cause of action within RSC O 18, r 19(1)(a)'.

22 *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 875.
23 (1861) 9 HL 360, at p 383.

24 Compare this with the position in Malaysia where by virtue of s 6(6) of the said Act, the application of the limitation period is subject to doctrine of laches as stated in s 32 of the said Act.

25 [1957] 1 WLR 31. Similarly in *Edwards v Edwards* (1965) VR 486 and *Mehmet v Benson* (1965) 113 CLR 547.

in which transaction the equitable interest of the land and possession of it has been passed to the plaintiff, after a delay of 10 years. The defendant raised the issue of 'too much delay' on the part of the plaintiff to commence the action. However, Lord Denning upheld the plaintiff's contention in that he has taken possession of the land. However, it is submitted that this could be reconciled because there is no provision for a limitation period in England for an action of specific performance. Thus, it is logical that the rule of equity plays its part. Furthermore, the court could invoke its inherent power to grant any order which is just for the parties in the event that no specific provision is available for the court to refer to.

The position in Malaysia

Although this doctrine has been codified in the said Act, ironically, it has been rebuffed and has not been applied satisfactorily in Malaysia. This is buttressed by a considerable number of decided cases. First and foremost, the courts in Malaysia in some cases seem to apply the only test, that is, whether the action of the parties was commenced within the limitation period. If the commencement of an action is made within the period allowed by limitation, no matter when the commencement is made after the accrual of the cause of action, the action still is valid and enforceable. This application, it is submitted, clearly disregards ss 6(6) and 32 of the Act. Secondly, in some cases, the procedural rule, in particular the requirement in s 4 of the Act, has been neither stressed nor upheld in most of the cases.

Based on the author's scrutiny, the application of the doctrine of laches in Malaysia is rather inconsistent, precarious, in a state of flagrant defiance of its true concept and does not seem to have uniformity. It is submitted that there are three categories of cases:

- (a) Cases where the court does not observe the doctrine of laches;
- (b) Cases where the court does observe the doctrine of laches even though the said doctrine has not been pleaded;
- (c) Cases where the court had properly applied the doctrine of laches and its procedural rules and had given due recognition to the doctrine of laches and its rules of procedure.

Cases where the parties had not raised the issue of laches and the court did not observe the same

The Malaysian approach of stressing the allowed limitation period and paying no heed to the importance of s 32 of the Act was clearly illustrated in several cases. For example, in an action for specific performance of a contract for the sale of land, the limitation period provided pursuant to s 9 of the said Act is 12 years from the accrual of cause of action. If the plaintiff commences the action exactly on the last day of the twelfth year, his action is still recognized by the court and is enforceable, regardless of whether his action is in fact barred if the doctrine of laches were to apply. Below is a few of the cases where the court failed to observe the doctrine.

In *Munah v Fatimah*,²⁶ the defendant's contention that laches apply was dismissed on the ground that the plaintiff had taken possession of the land, and the transfer of the land was pending, even though the plaintiff's action was made after 19 years after the agreement to purchase land was entered. Likewise in *Kersah La'usin v Sikin Menan*,²⁷ in which the facts and decision were similar to those of *Munah*. Similarly, in *Itam binti Saad v Chik binti Abdullah*,²⁸ the plaintiff's action was taken 16 years after the agreement to purchase the land. These cases are easy to reconcile because of *Williams v Greatrex*, where it was held that the action of the plaintiff is not defeated by laches (or limitation as in *Munah*) if the purchaser had taken possession of the land and is only awaiting the actual transfer by the vendor, as is the case with the purchasers in these two cases. However, in *Tan Shiang Shong v Tan Lee Choon & Anor*,²⁹ it was held that if there is no contract of sale and purchase, no payment made and no possession of the land, the purchaser would not be granted any relief.

However, in *Tan Swee Lan v Engku Nik Binti Engku Muda & Ors*,³⁰ the court had allowed the purchaser's action even though he had not taken possession of the land, as the action was commenced well within the limitation period. However, in this case, no issue of laches was raised by the vendor or had been dealt with by the court, between the date of the agreement (12 April 1958) and the date of the cause of action (2 March 1970) nor between the date after the date of the cause of action (3 March 1970) and the date of the commencement of the action by the purchaser (16 April 1970). In this case, what was important and regardless of whether the purchaser had taken possession of the land, is that should the purchaser commence the action well within the limitation period, calculated from the date of the cause of action, his action is valid and enforceable by the courts.

Similarly, in *Tan Swee Lan v Tengku Nik*, the doctrine of laches had not been applied. This was because the doctrine had not been raised and pleaded by the defendant. If the defendant had expressly pleaded that laches had occurred when there was a delay of 12 years before the plaintiff commenced the action, the outcome of the case could have been different.

*Nasri v Mesah*³¹ and *Ng Moh v Tan Bok Kim and Swee Lan*³² clearly demonstrated that such doctrine had been disregarded. In *Nasri v Mesah*, the sale and purchase agreement was entered into between the purchaser and the vendor on 5 June 1947. Although the plaintiff had paid the purchase price in full, no document of transfer was ever executed by the defendant because of the moratorium enforced. However, upon the expiry of the moratorium on 30 September 1949, the purchaser approached the vendor

26 [1968] 1 MLJ 54.

27 [1966] 2 MLJ 20.

28 [1974] 2 MLJ 53

29 [1985] 2 MLJ 369.

30 [1973] 2 MLJ 187.

31 [1971] 1 MLJ 32.

32 [1969] 1 MLJ 46.

and requested that the vendor execute the transfer. The request was turned down by the vendor. Hence, on 3 March 1967, the purchaser commenced an action for specific performance to compel the vendor to execute the transfer. At the High Court level, the application of the purchaser was rejected on grounds of limitation. However, it was reversed by the Court of Appeal. The reason for such finding was that the commencement of the action for specific performance of a contract of sale of land was well within 12 years from the date of accrual of the cause of action, by virtue of s 9(1) of the Limitation Ordinance. Again, nowhere in this case was the doctrine of laches mentioned. It is submitted that there was a failure on the part of the defendant to plead this defence as required by the law.

Similarly, in *Ng Moh v Tan Bok Kim & Anor*, the agreement was entered into on 30 December 1950 and the purchaser had paid part of the purchase price. The cause of action came into existence on 30 April 1955. The purchaser pursued the action on 16 September 1965 and it was held that such an action was valid and still within the limitation period, that is, 12 years from the date of accrual of cause of action. The issue of the application of the doctrine of laches was not raised at all in the period between the date of agreement and the date of cause of action and the period between the date of cause of action and the date of the commencement of the action. One could again rationalize that the defendant may not have expressly pleaded this defence as required.

Again, in *Peng Bee Sdn Bhd v Teoh Liang Teh & Ors*,³³ although the court found that the action of the purchasers was made after 12 years from the date of the accrual of the cause of action, the court failed to bring up the doctrine of laches. It is submitted that in this case, the doctrine of laches could be invoked, between the date of agreement (11 August 1980) and the date of the cause of action (7 June 1982) and between the date of the cause of action (7 June 1982) and the date when the action was filed in court (13 January 1995). However, it may be because this defence had not been pleaded. Thus, it is not surprising that this doctrine had not been discussed.

In *Ponnusamy & Anor v Nathu Ram*,³⁴ the agreement was entered into in August 1944 and the cause of action fell on 1 October 1949. The plaintiff filed his action on 1 December 1956. Although the defence of limitation of period failed, the court and the parties did not deal with the issue of laches. This may be so because there was no pleading on this doctrine.

This also appears to be the case in *Dewan Singh v M Thynappa Ltd & Yeo Teck Chiang*³⁵ and *Chee Hock Lai v Tan Swee Thai & Ors*.³⁶

Based on these cases, the parties could invoke the doctrine of laches provided they expressly plead it in their pleadings pursuant to s 4 of the Act. However, this was not done. Thus, it is not surprising and it is justified that

33 [2001] 1 MLJ 1.

34 (1959) MLJ 86.

35 (1939) MLJ 278.

36 [1990] 3 MLJ 477.

the issue of laches was not adjudicated upon. If this defence had been pleaded by the parties, it is submitted that the defendant (or in some cases, the plaintiff) would have won the case. A few observations can be made from this:

- (a) The plaintiff's action would not be in tatters even though the limitation period has lapsed or there is laches on his part as long as he has taken possession of the land, following *Williams v Greatrex*.³⁷ This was held in *Munah, Kersah La'usin, Nasri v Mesah, Ng Moh v Tan Bok Kim and Swee Lan* and *Itam binti Saad*. However, we should bear in mind that the position in England is quite different from that in Malaysia in that there is no limitation period provided in an action for specific performance as opposed to the legal situation in Malaysia, where by virtue of s 9 the Act, the limitation period for an action of

37 However, it could be argued that this decision was made following the decision in *Williams v Greatrex*, a case which originated in England based on common law (as in England then, there was no statutory provision dealing with the issue in question). Thus, it is submitted that contrary to s 3(1)(a) of the Civil Law Act 1956, which stresses that, 'provided that in the absence of any written provision in Malaysia the courts shall in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956'. This means that, provided that there is no written provision dealing with the limitation period on the action of specific performance in the contract of sale and purchase of land and on the doctrine of laches relating to the same, the court shall apply the common law of England and the rules of equity as administered in England as on 7 April 1956. On 7 April 1956, the Limitation Ordinance was passed and enacted, therefore codifying provisions for a limitation period for the specific performance of sale and purchase of land and the doctrine of laches. Thus, the court's policy, it is submitted, did not comply with the spirit and requirement of s 3 of the Civil Law Act 1956. Further, it can be argued that the policy of the court to follow the decision in *Williams v Greatrex* was unconstitutional. This is because by virtue of art 160 of the Federal Constitution, 'laws' to be applied in Malaysia include written (statute) law, common law to such extent as is enforceable in Malaysia or in any part thereof, and any *adat* or usages which are enforceable in the Federation or in any part thereof. The written law on this issue is the Limitation Ordinance 1953. The court must apply the provisions in the Ordinance and not the common law decision in *Williams v Greatrex*. This is because the Ordinance is the written law available in Malaysia. As long as the written law dealing with the issue in question is available, the courts are barred from applying the common law decision in *Williams v Greatrex*, in accordance with s 3(1)(a) of the Civil Law Act 1956. It is submitted that this is so even though art 160 of the FC states that one of the laws to be applied is common law. The application of the common law is restricted by s 3(1)(a) of the Civil Law Act 1956. Alternatively, art 4(1) of the Federal Constitution states that any law passed after Merdeka that is inconsistent with the Constitution is void. It is submitted that the policy of the court to apply *Williams v Greatrex* in Malaysian cases is inconsistent with s 3(1)(a) of the Civil Law Act 1956 and thus indirectly inconsistent with art 160 of the Federal Constitution and is therefore void and unconstitutional pursuant to art 4(1).

specific performance for the recovery of land is 12 years. Equitably, therefore, regardless of whether the limitation period has lapsed, as long as there is possession of the land by the purchaser/plaintiff, his action still survives;

- (b) Apart from the plaintiff's possession³⁸ of the land, which negates the defence of limitation and laches, in *Munah, Kersah La'usin* and *Itam binti Saad* it is submitted that even if the defendant pleaded the defence of laches, the defence may fail. This is because on the facts, there was nothing that had altered the defendant's position or right that would justify the court to allow the defence of laches. Therefore, on this ground alone, it is doubtful that the defence of laches would be tenable;
- (c) In all of the above cases, none of the parties that had pleaded the defence of laches either in its defence or in its application to strike off the plaintiff's pleading. As the requirement is that such a defence must be laced with procedure and must be pleaded in accordance with s 4 of the Act, it is not surprising that the judges in these cases were silent on the matter. If any of the parties had raised the defence without putting it in its pleadings, it is still submitted that the defence is untenable. Similarly, if the judges in these cases had raised this issue, which had not been pleaded by the parties, it is submitted that the defence of laches was still untenable.

Cases where the court does observe the doctrine of laches even though it has not been pleaded

In *M Ratnaval v S Lourdenadin* and *M Mahadevan v S Lourdenadin*,³⁹ however, the court did adjudicate on the issue of laches and had entertained and accepted the application of the doctrine even though it had not been expressly pleaded. In this case, the vendor (the first appellant) was the registered proprietor of a piece of land in Kuala Lumpur. The vendor and the purchaser (the respondent) entered into an agreement for the sale and purchase of the land at the price of RM93,000 free from all encumbrances. It was provided in the agreement that the sale of land shall be subject to the vendor obtaining a valid and registrable discharge of the charge of the land, which had been charged to one K Sinnathamby, since deceased, and also subject to the Ruler-in-Council granting to the purchaser an extension of time to erect a building on the land. There was a delay in the completion of

38 However, in *Tan Swee Lan* as opposed to *Munah, Kersah La'usin* and *Itam binti Saad*, the issue of possession of land was not the reason the court disallowed the defence of limitation or laches. This is because, as long as the plaintiff's action is made within the limitation period, his action is enforceable. The purchaser must have entered into a contract of sale with the vendor and had paid money to the vendor, before he could claim specific performance. The payment need not be in full as in *Tan Swee Lan* and *Ng Moh v Tan Bok Kim & Anor*. Cf: *Nasri v Mesah*, where the purchase price had been paid in full.

39 [1988] 2 MLJ 371.

the sale and eventually the vendor terminated the agreement and entered into a sale and purchase agreement of the land with the second purchaser (the second appellant). Later, the second purchaser was registered as the proprietor of the land.

The plaintiff (the purchaser) then took an action against the vendor and the second purchaser and prayed, *inter alia*, that the vendor had falsely and fraudulently represented to the Registrar of Titles that the issue document of title was lost, thereby inducing the Registrar to issue a continuation title. The plaintiff then applied for specific performance of the contract.

One of the issues dealt with by the court was the defence of laches of the vendor and the second purchaser. This defence was raised to negate the specific performance of the contract as prayed by the plaintiff (the purchaser). The court found that there was unreasonable delay or laches (14 months from the threat to her interest) on the part of the plaintiff (the purchaser) to institute legal proceedings against the vendor and there was unreasonable delay (five years) on part of the plaintiff (the purchaser) to lodge a caveat on the land to protect her interest.

On this issue, the court opined that laches was one of the reasons that specific performance could not be equitably granted. The reason was that the plaintiff took 14 months to institute proceedings against the vendor and the second purchaser after the cause of action had accrued. The plaintiff's counsel submitted that it was immaterial whether the delay lasted 14 months as long as action was taken within the limitation period. The court rejected this defence on the ground of s 32 of the Act, also, the circumstances rendered the grant of specific performance unjust. The judge cited *Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors*⁴⁰ and *Lindsay Petroleum Co v Hurd*⁴¹ to support his decision.

According to the court, laches in this case came into play when:

- (a) The plaintiff (the purchaser) filed the writ of summon on 18 September 1974, which constitutes a 14-month delay from the date of the cause of action.
- (b) Delay on the part of the purchaser of five years to lodge caveat; and,
- (c) Delay on the part of the purchaser to add the second purchaser to the writ, which was only made on 21 April 1982, that is, more than seven years after the writ of summon was filed.

In *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* and *Tan Kim Chua Realty (M) Sdn Bhd v Lye Thai Sang & Anor*,⁴² the doctrine of laches was raised and entertained by the court even though it had not been pleaded by the parties. In this case, the court invoked the doctrine of laches and found that the plaintiffs were estopped because they were guilty of laches in

40 (1878) 3 App Cas 1218 143 at p 1279.

41 [1874] LR 5 PC 221.

42 [1985] 2 MLJ 380.

that since 1978, although the plaintiff knew that the acts of the defendant were contrary to the agreement, even with such knowledge, no action had been taken against the defendant. Only on 23 May 1983 did they file the originating summons against the defendant praying for declaratory judgment, on which date the court found the delay to be tantamount to laches.

The facts of the case were that on 1 April 1977, the owner of a multi-storey complex — the Merlin Tower Johor, sold a parcel in the complex to the plaintiffs. Under a clause of the sale and purchase agreement, it was provided that certain parts of the complex was considered 'common property'.

Later, the owner built a mezzanine floor in the 24-foot square void between the roof garden and the fifth floor and converted a portion of the ground floor passageway into a hotel lobby. The owner sold the basement car parks, the mezzanine floor and the hotel lobby to the second purchaser. The second purchaser transferred these to the third and fourth purchasers. The third purchaser then applied for separate titles to the car park, mezzanine floor, hotel lobby and roof garden.

The plaintiffs contended that these portions transferred by the second purchaser to the third and fourth purchasers were 'common property' under the agreement. Thus, the plaintiffs by way of originating summons asked for a declaration to that effect and further declarations that the construction of the mezzanine floor and the conversion of the void into a hotel lobby were unreasonable as contrary to a clause in the agreement; that the sites chosen were common property; that the sale of the property to the second purchaser and the other purchasers were *ultra vires* the agreement and thus void. The court gave judgment in favour of the plaintiffs. The owner appealed. The court allowed the appeal of the owner and one of the grounds was that the plaintiffs had committed laches.

However, there are certain matters that necessitate scrutiny. First, it is submitted that the defence of laches by the owner is bound to fail because the delay in this case, on the facts, had not altered the defendant's or the other third parties' positions in a manner that would prejudice them and cause injustice. Secondly, there was nothing in the report that mentioned that the defendant/owner had pleaded either in the statement of defence or in the summons in chambers that the statement of claim pursuant to O 18 r 19 be struck off. It is submitted that the defence of laches must be pleaded by the defendant as required by s 4 of the Act.

The above policy of the court towards invoking the defence of laches is repeated in *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor*⁴³ and in *Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin*,⁴⁴ where the court had invoked the doctrine of laches without being pleaded by the parties in the litigation.

43 [1995] 3 MLJ 6.

44 [1997] 2 MLJ 487.

In this case, it was held that the delay of almost 30 years for the beneficiaries of the deceased to transfer the land in question into their names and their failure to lodge a caveat or endorse a trusteeship on the title amounted to laches. The delays were material and it would be unjust to act in such a manner as to deny the defendant his rights and position.

On the policy of the court in raising the issue of laches, one could enquire whether the court could rely on its inherent jurisdiction under O 92 r 4 of the Rules of the High Court to invoke the issue of laches, even though this is not pleaded by the parties. It can be said that the court could invoke its inherent jurisdiction to set aside any action which is regarded as an abuse of the judicial process. This is the principle enunciated in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd*,⁴⁵ where Peh Swee Chin SCJ said:

It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence, as the case may be.⁴⁶

However, in the author's view, it is submitted that the inherent power of the court could not override the express provision of s 4 of the Act. This is highlighted in *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Seamah & Ors*,⁴⁷ where Syed Agil Barakbah SCJ in referring to O 92 r 4 of the Rules of the High Court 1980, which is in pari materia with O 53 r 11 of the Subordinate Court Rules 1980, said at p 181:

It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

This is further cemented in *Re ABZ (An Infant)*,⁴⁸ where an application to set aside an adoption order in the exercise of the court's inherent jurisdiction was refused as the Adoption of Children Act 1930 is not affected by the inherent powers of the court.

Therefore, it is submitted that the policy and approach of the court in the above cases falling under this second cohort, (*M Ratnaval*, *Faber Merlin*, *Goh Keng How* and *Wu Shu Chen*), with due respect, is wrong.

It is also pertinent to ask whether it would be sufficient for any of the parties in the proceedings, without including the defence of laches in their

45 [1993] 3 MLJ 16. See also *Tractors Malaysia Berhad v Tio Chee Hing* [1975] 2 MLJ 1 and *Pacific Centre Sdn Bhd v United Engineers (M) Berhad* [1984] 2 MLJ 143, per Edgar Joseph Jr J in p 147; *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* 4 WW 542; and in *Loo Chay Meng v Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445.

46 *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] at p 25.

47 [1988] 1 MLJ 178.

48 [1992] 2 SLR 442.

pleadings, to merely raise the issue of laches by way of preliminary objection pursuant to O 33 r 2. It is submitted that it would not be sufficient because this would not comply with the requirement of s 4 of the Act which requires that the defence of laches be pleaded.

Cases where the court had properly applied the doctrine of laches and its procedural rules and had given due recognition to the doctrine of laches and its rules of procedure

One of the cases in which, in the author's view, the doctrine of laches and its procedural rules are properly applied is *Caltex Oil (Malaya) Ltd v Ho Lai Yoke & Anor.*⁴⁹

In *Caltex Oil*, by an agreement dated 26 March 1961, the vendors granted to the plaintiff an option to purchase a parcel of land, provided such option was exercised within six months. The plaintiff in due course exercised their option by notice in writing dated 22 September 1961, where they agreed to pay RM33,500 in cheque, which was deposited with the plaintiff's solicitors as consideration for the delivery of documents of title and registrable transfers. However, no documents of title were delivered to them on grounds that the title to their own Lot No 145 was then in the possession of Malayan Banking Ltd as chargors upon a charge for \$10,000, and they had no title yet to the portion of Lot No 165 which they undertook to transfer under cl 5 and no title had been issued to them yet for the portion of State land under Lot 3.

On 12 October 1961, the plaintiffs took back for cancellation their cheque made out in favour of the vendors on 21 September 1961 and in its place they paid over a similar sum to their solicitors to be paid out by the latter 'when the ownership details are satisfactorily settled'. On the same day, the vendors' solicitors wrote to the plaintiffs' solicitors informing them that the vendors had purchased Lot 165 from the beneficial owners and had requested that the plaintiffs pay 90% of the purchase price in advance. On 21 October 1961, the vendors applied to the collector for a variation of the express condition attached to the alienated portion of Lot 3. Upon the collector refusing this on 7 April 1962, the vendors' solicitors wrote to the plaintiffs' solicitors conveying the information and requesting an advance payment. On 8 May 1962, the vendors' solicitors wrote to the plaintiffs' solicitors that the vendors considered the agreement to be at an end. The plaintiffs claimed specific performance of the contract.

One of the defendant's defences was laches on the plaintiffs' part in failing to commence this action until the lapse of 19 months since the notice of termination of the agreement, hence the plaintiffs are debarred from seeking relief by way of specific performance.

Ong J said that from the correspondence, the conduct of the parties and the death of one of the vendors on 30 November 1961, it was impossible for

49 [1964] MLJ 76.

any valid and registrable transfer to be executed until the constitution of a proper legal representative 16 months and five days later. This, it is submitted, would conform to the requirement of the doctrine of laches that it is not just delay in bringing the action but the fact that during the delay, the defendant had altered its position, which makes it unjust to grant and allow such defence to diminish such rights or position enjoyed by the defendant. Thus, for this reason the defence of laches in this case failed.

Similarly, in *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed*⁵⁰ the doctrine of laches and its procedural rule was applied successfully. In this case, the vendor had entered into a sale and purchase agreement with a purchaser. The purchaser had paid the full purchase price. The vendor died before the transfer was effected. Six months after the vendor's death, the purchaser tried to get the transfer registered in pursuance of s 85(ii) of the National Land Code and because no leave was given by the court to allow such transfer by virtue of s 95(iii) of the Probate Enactment. The purchaser applied for specific performance but his application was rejected by the court. The purchaser appealed.

The Court of Appeal held that the purchaser was entitled to specific performance. One of the defences of the defendant was that there was laches on the part of the purchaser which caused hardship to the beneficiaries of the estate of the deceased as he failed to present the transfer for registration within reasonable time and instead took about six months after the death of the vendor to do so. However, there was unfortunately no prayer, pleading or any argument in court relating to the hardship caused due to this delay. On the delay which caused hardship to the plaintiff in this case, Brigg J said that:

The delay in presenting the transfer was certainly considerable, and if it had operated in any way so as to prejudice the estate of the transferor, the court would be obliged to look very closely into the reasons for delay and to decide whether the delay was in the circumstances excessive. It is not, however, suggested that any detriment has arisen from the delay and, that being so, I see no reason why it should bar the plaintiff's claim. Merely to have to sign another transfer is not to suffer detriment in this sense. As regards hardships, there was some evidence at least of undervalue; but this alone does not constitute hardship which will cause the court to refuse specific performance. There must be some unfair or unequal dealing in addition. See *Fry on Specific Performance*, 6th Edition, pp 209–212. I think there is no substance in either of these defences. I also think that if hardship is relied on in a case of this kind, it is desirable that it should be pleaded with particulars of the facts relied upon.⁵¹

Conclusion

The doctrine of laches is a common law doctrine originating from the court of equity. This doctrine is well entrenched in the Malaysian Limitation Act

50 [1952 MLJ] 37.

51 *Ibid*, at p 40.

953, in particular in s 32. However, it is disheartening that this doctrine is not fully applied in Malaysia where in most cases, the courts, with due respect, pay scant regard to this doctrine and its application. This would result in the course of justice being deflected. If the doctrine were fully appreciated and properly applied, it would serve as a good defence for the defendant (or in some cases for the plaintiff). In conclusion, a few observations can be made and recapitulated from the scrutiny of the above cases.

- (a) The parties must plead the defence of laches in their pleading either in the statement of defence or in a summons to strike out the pleadings pursuant to O 18 r 9 of the Rules of the High Court 1980. This has been emphasized in s 4 of the Limitation Act 1953.
- (b) It is not enough to plead the defence of laches where the defendant (sometimes the plaintiff) has unreasonably delayed the commencement of an action. In order to succeed, the position of the defendant (or the plaintiff) must have been altered in such a way that makes it unjust to grant the relief. This has been defined by the judicial committee in *Lindsay Petroleum Company v Hurd*, *ICF Spray and Peh Swee Chin J in Cheak Kim Ton & Anor v Taro Kaur*;
- (c) The defence of laches is still available and is an untrampled defence, even though the limitation period still subsists in accordance with ss 6(6) and 32 of the Limitation Act 1953. This means that in spite of the fact that the limitation period still subsists, the plaintiff's (or the defendant's) action could still be destroyed if in the course of the delay there is laches on his part;⁵² and

52 However in *Bank Bumiputra Malaysia Berhad v Fu Lee Development Sdn Bhd (Rukaiyah bte Julai @ Rokayah as Intervener)* (1992) 1 AMR 43, which involved action for recovery of money secured by a charge on land must be made within twelfth (12) years from the date when the right to receive the money accrued, pursuant to s 21(1) of the Limitation Act 1953 (Act 254) where in it was held that the maxim of laches has no application to cases to which the statutes of limitation apply either expressly or by analogy. However this is easy to reconcile because nothing in the Limitation Act which qualified the application of s 21. This is different with s 6 where it is qualified by s 32 (laches) and s 22 (trust property). In *Cheak Kim Tong & Anor v Taro Kaur* (1989) 3 MLJ 252, which involved action of trespass. It was held in that case that the defence of laches would not have applied in any event for the plaintiffs should be entitled to the full statutory period before their claim became unenforceable. The judge referred to *Re Pauling's Settlement Trust, Younghusband v Coutts & Co* (1962) 1 WLR 86 and *Tan Tuan Kiat & Anor v Pritam Singh Brar* (1987) 1 MLJ 276. It is submitted that, this decision is wrong because by virtue of s 6(6) of the Limitation Act, the application of limitation period is subject to s 32 (laches). This means that, even though the limitation period is still subsisting, if there is laches, the plaintiff's action would fail. See also the author's opinion and submission that this in contrary to s 3(1)(a) of the Civil Law Act 1956 and it is unconstitutional as at foot note no 37.

- (d) The court has no inherent power under O 92 r 4 of the Rules of the High Court 1980 to raise and adjudicate laches if the parties in the proceedings fail to plead the defence of laches expressly.

It is hoped that through the illumination of the doctrine of laches and its misapplication in Malaysia, this article will be beneficial to us and will behave us to act with circumspection.

The author would like to express thanks to Associate Professor Haji Hairuddin bin Megat Latif for his advice and guidance.

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