

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
SAMAN PEMULA NO. WA-24NCC-28-01/2022**

**Dalam perkara A.5 k.3, A.7 dan
A.28 Kaedah-Kaedah
Mahkamah 2012**

Dan

**Dalam perkara kontrak
bertarikh 20.11.2020 antara 555
Film Sdn Bhd, Big Foot
Entertainment Sdn Bhd,
Adamancy Construction Sdn
Bhd, Lam Pui Yee & Chin Leken**

Dan

**Dalam perkara Akta Kontrak
1950**

ANTARA

- 1. 555 FILM SDN BHD
(NO SYARIKAT: 202001026139) (1382459-H)**
- 2. BIG FOOT ENTERTAINMENT SDN BHD
(NO SYARIKAT: 201701001474) (1215624-U)**



**3. LAM PUI YEE
(NRIC NO. 870330-14-5376)**

**4. CHIN LEKEN
(NRIC NO.851021-14-6451)**

... PLAINTIF-PLAINTIF

DAN

**ADAMANCY CONSTRUCTION SDN BHD
(NO. SYARIKAT: 200201008163) (575826-A)**

... DEFENDAN

JUDGMENT

A. Introduction

[1] This case involves the film “Kongsi Raya” (“Film”). The plaintiffs and the defendant entered into an agreement dated 20 November 2020 (“Agreement”), on the production, marketing, promotion and screening of the Film. The 1st plaintiff is the producer of the Film, while the defendant is an investor.

[2] A dispute arose on payment of the final tranche of the investment sum, resulting in the plaintiffs filing an originating summons, seeking a declaration that the Agreement is terminated. The defendant in turn filed a counterclaim seeking a declaration that the notice of termination dated 27 December 2021 (“Notice of Termination”) is invalid and that the Agreement is still in force.



[3] I dismissed the originating summons. I found that in terminating the Agreement, the 1st plaintiff had completely disregarded correspondences that varied the terms of the Agreement. As a result, the condition for the issuance of the Notice of Termination, namely the defendant's failure to pay the investment sum, had not been triggered. Because of this, I found the Notice of Termination to be invalid. As a consequence of this finding, I also allowed the counterclaim.

B. Background Facts

[4] The Agreement was executed by the following parties:

- a. the 1st plaintiff, the producer of the Film;
- b. the 2nd plaintiff, the holder of a license from the National Film Development Corporation ("FINAS"). The 2nd plaintiff had granted the 1st plaintiff the right to use the license to produce the Film;
- c. the 3rd and 4th plaintiffs, directors of the 1st plaintiff; and
- d. the defendant, an investor.

[5] The defendant agreed to invest RM2,000,000 in the Film, and the Agreement was executed to record the commitment of the parties in respect of the investment into, as well as the production, marketing, promotion and screening of the Film.



[6] The relevant terms of the Agreement are as follows:

- a. Clause 2.1 provides that the total investment sum shall be released by the defendant in the following manner:
 - i.* The first payment of RM1,000,000, shall be released upon signing of the Agreement, on 25 November 2020.
 - ii.* The second payment of RM500,000 shall be released upon completion of shooting and post-production, on 1 February 2021.
 - iii.* The third payment of RM500,000 (“Final Investment Sum”) shall be released upon the commencement of marketing and promotion of the Film, on 1 March 2021.
- b. Clause 2.3 contains an undertaking by the 1st plaintiff to pay the defendant the Investment Return within the Repayment Period. In this regard:
 - i.* “Investment Return” is defined as: “... *the sum that is equivalent to 75% of the Gross Revenue collected by the Producer within the Repayment Period, OR the sum of RM2.42 million, whichever is higher.*”



ii. “Repayment Period” is defined as “... 12 months from the date next to the Completion Period.”

iii. “Completion Period” is defined as: “... the period from the signing hereof until 31st May, 2021 whereby the shooting and post-production of the Film must have been completed, including the Date of Release, unless otherwise extended by the Investor.”

c. Clause 9.1 provides that if the defendant fails to pay the investment sum or part thereof, the 1st plaintiff shall be entitled to terminate the Agreement and forfeit 10% of the investment sum.

d. The annexure of the Agreement refers to the screening date (which is presumably the Date of Release) of the Film, as May 2021. The annexure also indicates that marketing and promotion will commence three months prior to the Date of Release. “Date of Release” is defined as: “... the official date of screening of the Film in the local cinema, unless otherwise decided by the Parties hereto ...”

C. The Dispute

[7] The dispute between the parties arose from the non-payment of the Final Investment Sum by the defendant.



[8] It is undisputed that the first payment of the investment sum in the sum of RM1,000,000 and the second payment in the sum of RM500,000 have been paid. However, the Final Investment Sum, which was due to be paid by 1 March 2021, was not paid.

[9] The initial reason for non-payment of the Final Investment Sum is because the exact Date of Release could not be scheduled due to the COVID-19 pandemic, and approval from FINAS was not obtained.

[10] FINAS had originally scheduled the Film for release on 1 September 2021, but this was delayed. FINAS finally confirmed by way of a letter dated 1 October 2021 (“FINAS Letter”), that the date of release of the Film is 3 February 2022 (“Confirmed Date of Release”).

[11] With this Confirmed Date of Release, the 1st plaintiff claimed that the Final Investment Sum was due in November 2021, three months prior to the Confirmed Date of Release.

[12] The 1st plaintiff issued an invoice dated 22 November 2021 for the Final Investment Sum, and a letter of demand dated 13 December 2021 (“Letter of Demand”), demanding payment of the Final Investment Sum.

[13] Thereafter, the Notice of Termination was issued, to terminate the Agreement. The 1st plaintiff returned a sum of RM1,350,000 to the defendant, which is equivalent to the total investment sum, less the 10% forfeited from the total investment sum, in accordance with clause 9.1.



D. Assessment And Findings

[14] The question before this court is whether the 1st plaintiff was entitled to terminate the Agreement, due to the non-payment of the Final Investment Sum.

[15] The Letter of Demand and the Notice of Termination relied on the Confirmed Date Of Release of 3 February 2022. Based on this date, payment of the Final Investment Sum should have been made by 3 November 2021.

[16] However, the 1st plaintiff had neglected to refer to various exchanges between the parties, which in my view, had resulted in a variation of the Agreement. It is pertinent to note the only requests for extensions of the Completion Period and the Date of Release were made by the 1st plaintiff through these correspondences:

- a. An email dated 26 April 2021, pursuant to which the 1st plaintiff requested for the Completion Period to be extended to September 2021.
- b. A letter dated 5 May 2021, pursuant to which the 1st plaintiff had requested for the Date of Release to be extended for a further four months from 1 June 2021, or until the actual date of release of the Film,

(collectively, "Requests for Variation").



[17] By a letter dated 5 May 2021, the defendant agreed to the requests of the 1st plaintiff (“Confirmation of Variation”).

[18] The Agreement must be read with the Requests for Variation and the Confirmation of Variation, which extended the Completion Period and the Date of Release to the end of September 2021.

[19] When the 1st plaintiff received the FINAS Letter, the 1st plaintiff issued an email dated 1 October 2021, to inform the defendant of the Confirmed Date of Release. In the email, the 1st plaintiff enquired on the following:

- a. Whether the date of completion of the Film could be extended to February 2022.
- b. Whether the ratio of the Investment Return could be revisited, if the defendant only pays a total investment sum of RM1,500,000, instead of RM2,000,000.

[20] This time, the defendant did not agree with the requests of the 1st plaintiff. This is clearly set out in a letter dated 13 October 2021 (“Defendant’s 13 October Letter”), the content of which is as follows:

- a. The defendant informed the 1st plaintiff that it was unable to agree to both enquiries in the 1st plaintiff’s email.
- b. The defendant stressed that the Final Investment Sum was ready to be paid upon completion of the Film and



upon commencement of marketing and promotion of the Film.

- c. The defendant addressed the issue of the extension of the Completion Period (and hence the date of completion of the Film) to 30 September 2021. The defendant expressed its agreement to this extension, and stated that the Repayment Period should commence immediately after the end of the Completion Period, i.e. 1 October 2021. This agreement is conditional upon the 1st plaintiff's payment of the Investment Return within the Repayment Period.

[21] The 1st plaintiff's response to this letter was an email dated 18 October 2021 ("1st Plaintiff's 18 October Email"). In this email, the 1st plaintiff agreed to the commencement of the Repayment Period on 1 October 2022. The 1st plaintiff also confirmed that the Final Investment Sum was no longer required. The 1st plaintiff requested the defendant to reconsider readjusting the Investment Return, taking into account that the total investment sum paid would be RM1,500,000.

[22] There is however no evidence to show that the defendant had agreed to this proposed readjustment. As the defendant had issued the Defendant's 13 October Letter, informing the 1st plaintiff that it did not agree to the 1st plaintiff's request to revisit the ratio of the Investment Return, and confirming that the Final Investment Sum was ready to be made, it is clear that the defendant had not agreed to this readjustment.



[23] The 1st plaintiff had argued that the 1st Plaintiff's 18 October Email was not a confirmation that the Final Investment Sum was not required. Specific consideration must be given to the wording of the 1st Plaintiff's 18 October Email, in order to fairly assess the intention of the 1st plaintiff. The relevant parts of the email state as follows:

"We would like to confirm here with that the balance Investment Sum of RM500,000.00 only (which is currently held by you in your bank account) is no longer needed by us, as GSC has agreed to advance some A&P funds to us and we are seeking for support from certain sponsors. As such, we would like to seek your indulgence to adjust the Investment Return ..."

(emphasis added)

[24] It is settled that contracts are to be interpreted objectively, and it is not the role of the courts to improve the terms of a document (see ***SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464***). Based on my objective interpretation of the above sentences, I am unable to see how these sentences could be construed in any way other than a confirmation that the Final Investment Sum was no longer required by the 1st plaintiff.

[25] My assessment of the documents exchanged between parties, specifically, the Agreement, the Requests for Variation, the Confirmation of Variation, the Defendant's 13 October Letter and the 1st Plaintiff's 18 October Email, has led me to the finding that the agreed contractual position of the parties, is as follows:



- a. The Completion Period ends on 30 September 2021. This is the date of completion of the Film.
- b. The Repayment Period commences on 1 October 2021.
- c. Payment of the Final Investment Sum is no longer required to be made.

[26][26] With this contractual position, I am of the further view that the issuance of the Notice of Termination pursuant to clause 9.1 of the Agreement, is misconceived.

[27] Clause 9.1 states as follows:

"In the event the Investor shall fail to release the Investment Sum or any part thereof in accordance with the Schedule of Payment, then unless the Producer has agreed to grant to the Investor further period to release the relevant payments (which have become due and payable), the Producer shall be entitled to serve a notice to the Investor to terminate this Agreement whereupon the Producer shall be entitled to forfeit the sum that is equivalent to 10% of the Investment Sum released so far by the Investor in accordance with the Schedule of Payment and shall forthwith refund the remaining sum to the Investor within 30 days failing which interest at the rate of 10% per annum shall be chargeable by the Investor against the said remaining sum from the 31st day onwards until the full settlement of the said remaining sum. After the refund, the right



and interest of the Film shall be automatically be reassigned to the Producer in absolute manner”.

(emphasis added)

[28] The schedule of payment of the Agreement, which requires the defendant to release the Final Investment Sum on 1 March 2021 is no longer valid, taking into account the Requests for Variation and the Confirmation of Variation. It is to be noted that notwithstanding the variation of the Agreement, parties had not agreed on when the Final Investment Sum is due and payable. Coupled with this is the 1st Plaintiff's 18 October Email, pursuant to which the 1st plaintiff confirmed that the Final Investment Sum was no longer required.

[29] Thus, the condition for the issuance of a notice of termination, namely the non-payment of the Final Investment Sum, has not been met, and the 1st plaintiff was not entitled to terminate the Agreement. With this finding, it follows that the Notice of Termination is invalid, and the Agreement is still in force.

E. Decision

[30] Based on the above, I dismissed the originating summons. Consequently, the defendant's counterclaim, seeking *inter alia*, a declaration that the Agreement is in force and had been varied in line with Requests for Variation and the Confirmation of Variation, and an order requiring payment of the Investment Return, is allowed.



Dated 26 September 2022

- sgd -

Adlin Abdul Majid
Judicial Commissioner
High Court of Malaya
Commercial Division (NCC6)
Kuala Lumpur

Counsel:

Plaintiffs : Mark Foong of Messrs. Mark Foong & Ng

Defendant : Haisha Dewi Zaid of Messrs. Haisha Dewi & Co

Case referred to:

*SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1
MLJ 464*



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