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Settling For Less

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Introduction

In the Malaysian legal practice, Tomlin Orders are a relative rarity. *Ng Bee Lin v Ekowood International Bhd & Anor* [2021] MLJU 1842 is one such rare occasion where Tomlin Orders were resorted to only to have terms unenforced by the High Court. This alert seeks to analyse the judgment in *Ng Bee Lin* and to discuss whether it shows that Tomlin Orders are no longer relevant in the modern-day context.

Background Facts

At the heart of the dispute is the property known as “the Villa”. The original owners of the Villa were embroiled in two Magistrate Court suits with the Defendants, Ekowood International Berhad and Ekowood Malaysia Sdn Bhd (collectively “Ekowoods”). In or about May 2019, two consent judgments in the form of Tomlin Orders were entered into to settle said Magistrate Court suits. The nature of a Tomlin Order will be explained in a separate heading below.

The Tomlin Orders, *inter alia*, provided that the Villa would be security for the total debt owed to Ekowoods. In September 2020, the Plaintiff purchased the Villa, and lodged a private caveat on the Villa in October 2020. The Plaintiff is a bona fide purchaser for value without notice. Ekowoods each also lodged a private caveat on the Villa in December 2020 and April 2021 respectively, preventing the Plaintiff from registering his title. The Plaintiff filed an Originating Summons to remove Ekowoods’ private caveats pursuant to Section 327(1) of the National Land Code 1965.

The High Court’s Decision

The Court granted the Plaintiff’s motion. More interestingly, the Court held that the Tomlin Orders granted to Ekowood carried no caveatable interest in the Villa.

The High Court sought to answer the question whether a contractual promise to use the Villa as collateral for debt repayment constitute a registrable interest in the Villa under Section 323(1) of the National Land Code?

Citing the Federal Court in *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 MLJ 113, the High Court held “no”. In *Wong Kuan Tan*, the Federal Court held that the failure to fully pay a debt constitutes a contractual right only and not a caveatable interest. Accordingly, the Court concluded that the Tomlin Orders did not confer Ekowoods with any registrable interest in the Villa within the meaning of Section 323(1).

To contextualise *Ng Bee Lin's* decision in respect of the Tomlin Order, it is necessary to understand the nature of a caveat. The Federal Court in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475 adequately summarises the law:

“[25] A caveat is a creature of statute namely, the NLC and hence it can only be lodged by a claimant who has a caveatable interest under the NLC...”

The Federal Court further held that:

“[45] Parties cannot by agreement between themselves create a caveatable interest.”

Ng Bee Lin may be said to be a circumstance where a party received less than what they had bargained for – for Ekowoods were supposedly entitled to hold the Villa as security under the Tomlin Orders yet were not allowed to lodge a caveat in pursuance thereto. A credible case may be advanced that Tomlin Order is irrelevant due to its enforceability.

Tomlin Orders- A Summary

A Tomlin Order is a special form of consent order and is extremely useful both in practice and in law. In *Zenith Logistics Services (UK) Ltd and others v Keates and others; UUU v BBB* [2020] 1 WLR 2982, the English High Court

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noted that Tomlin Orders “had long been recognised as a useful form of order” which “allows parties to incorporate terms which the court could not order”. At this point, it would be appropriate to note the distinctive characteristics of a Tomlin Order:

- i. It consists of two distinct parts: the Court Order and the Schedule.
- ii. The Court Order imposes a stay of proceedings.
- iii. Liberty for both parties to apply for, and for the court to grant, further enforcement orders.

Zenith Logistics’ reference to “terms which the court could not order” refers to the terms of the Schedule which only acts as a binding contract between the parties and not a court order.

This is attractive in settling commercial disputes. A court order would be limited to matters in dispute, whereas a Tomlin Order allows parties to explore settlement terms outside the four walls of the courtroom and tailor a pragmatic settlement that properly encompasses the relationship between the parties, especially in commercial disputes where parties have a long-standing relationship. In granting a Tomlin Order, the court does not, in fact, endorse or approve the terms of the Schedule when making the Order (*Zenith Logistics*). The Court is simply exercising its case management powers when ordering a stay of proceedings. Lastly, enforcement of Tomlin Orders does not require a different action to be initiated; one party simply needs to apply to lift the stay. This is both frugal and time efficient compared to enforcement of a consent judgment which will involve bringing new proceedings.

Analysis

Returning to the facts of *Ng Bee Lin*, it is important to remember the Villa was only a security that Ekowood sought for the repayment of the debts owed. Should the circumstances arise whereby Ekowoods were entitled to possession of the Villa and the debtor could not legally transfer the property, perhaps Ekowoods could rely on equity

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to secure the Villa, as per *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 where it was observed that:

“Examination of courts’ decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor’s land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created.”

In other words, the Tomlin Order could have been effective in either repayment of the debt or securing the Villa. It only fell short of creating proprietary rights to support a valid private caveat under the National Land Code, which was the specific action Ekowoods took.

In fact, even if the usual consent orders were entered instead of the Tomlin Orders, Ekowoods would not have obtained caveatable interests over the Villa, as private caveats are creatures of statute.

Conclusion

Ng Bee Lin is not indicative of the shortcomings of Tomlin Orders. To lodge a private caveat over the Villa using Tomlin Orders in this instance is trying to fit a square peg in a round hole. Ekowoods may not have faced such a fate, if only they had created a charge over the Villa pursuant to Part 16 of the National Land Code.

Authored by Roshanth Aaron James, a pupil from the firm’s Dispute Resolution practice.

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