

Asal Anggun Development Sdn Bhd v Amiruddin bin Abdul Rahman & Anor A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT B
NO WA22NCVC-398-07 OF 2016
SU GEOK YIAM J
21 SEPTEMBER 2018

Contract — Sale and purchase of land — Conditional contract — Election — Variation of time — Whether properly communicated — Whether defendant may terminate contract due to frustration when plaintiff had right to elect for further extension of time — Prospect of frustration C

Contract — Terms — Variation — Variation of clauses — Inaction during breach of terms would lead to variation of clause — Whether clause may be relied on to terminate a contract when it had been varied — Whether termination of contract subsequent to variation mala fide D
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Land Law — Caveats — Caveatable interest — Whether plaintiff had caveatable interest — When may a person lodge private caveat — Purpose of lodging private caveat F

This was the plaintiff's action to declare for the following: (a) a declaration that the termination by the first defendant of a sale and purchase agreement dated 9 October 2012 entered into between the plaintiff and the first defendant for a piece of land ('the SPA') vide a letter of termination dated 18 May 2016 was baseless and had no legal effect; and (b) an order for specific performance to compel the first defendant to comply with the direction of the plaintiff given to the first defendant pursuant to cl 2.2 of the SPA to make as many appeals as were necessary against the refusal of the relevant authority to give its consent to the first defendant for the transfer of the piece of land to the plaintiff until the consent was secured by the first defendant or alternatively, to wait until a period of ten years from the date the piece of land was alienated to the first defendant by the government had lapsed before making a fresh application to the relevant authority to secure its consent for the transfer of the piece of land to the plaintiff. The plaintiff was the purchaser of a piece of land held under PN50866 Lot 168 Seksyen 88, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the said land'), the first defendant was the vendor of the said land. The facts of the case were that vide a conditional contract being the SPA, the first defendant agreed to sell to the plaintiff the said land at the purchase price of RM1,855,714 in accordance of the terms and G
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- A** conditions stated therein. The plaintiff had paid a total of RM764,732 being that for: (i) the advanced premium for the alienation of the said land as the earnest deposit for the purchase of the said land; (ii) the premium and the expenses for the alienation of the said land; and (iii) monies paid by the plaintiff in advance on behalf of the first defendant for expenses incurred which was to be taken as part payment of the purchase price. The SPA was agreed by the parties to be conditional upon the issue document of title being registered in the name of the first defendant and the first defendant being successful in obtaining the state authority's consent to sell and transfer the land to the plaintiff ('the two conditions precedent'). The first condition was fulfilled, and it was pending the second condition precedent where it could not be fulfilled by the first defendant. Before the first defendant could fulfil the second condition, the plaintiff had lodged a private caveat on the title of the said land, which the first defendant's solicitors had failed to object on behalf of the first defendant to the lodgement of the aforementioned private caveat. The first defendant subsequently applied on 20 June 2013 to the Director of Lands and Mines to obtain consent to transfer the land to the plaintiff which was then rejected. Subject to cl 2.2 of the SPA, in the event the two conditions precedent could not be complied with by the first defendant, the plaintiff may choose to either: (1) grant the first defendant such extended time as agreed by the plaintiff to effect the compliance of the two conditions precedent; or (2) terminate the SPA. The plaintiff in this event chose the first option and granted an extension of time to the first defendant. The first defendant then submitted the first appeal which was rejected on 1 April 2014 and another extension of time was granted to the first defendant by the plaintiff. The first defendant lodged a second appeal on 3 November 2014, where the first defendant did not inform the outcome to the plaintiff. On 15 February 2016, the plaintiff received from the second defendant a copy of Form E being the proposed acquisition of a portion of the said land and Form F being notification of investigation, both dated 27 January 2016 together with a copy of the notification of investigation to the plaintiff. In cl 15.01(b) of the SPA, the parties had agreed that if the plaintiff elects to complete the purchase of the said land notwithstanding the acquisition of any part thereof within the completion date or extended completion date (as the case maybe), the first defendant shall, immediately, notify the relevant acquiring authority of the plaintiff's interest in the said land and the compensation shall belong to and be paid to the plaintiff subject to full payment of the balance purchase price by the plaintiff. Vide a letter dated 18 May 2016 the first defendant terminated the SPA based on the fact that the plaintiff had breached cl 16.01 of the SPA and caused a private caveat to be entered on the title of the said land. Subsequent to the filing of this suit, the hearing for the acquisition of a portion of the said land was held before the second defendant, and the first defendant was awarded a total compensation sum of RM1,287,191.78. The plaintiff had applied to the Kuala Lumpur High Court for its determination as to which party was entitled under the SPA to the compensation awarded by the second defendant and the

Kuala Lumpur High Court NCVC 1, which was hearing the application was awaiting the decision of this court in this case. Parties had consented to the compensation to be deposited into the Kuala Lumpur High Court NCVC 1 pending the disposal of this suit by this court. The plaintiff submitted the following: (A) the termination of the SPA by the first defendant, purportedly, under cl 4.01 of the SPA was wrongful as the first defendant was aware of the breach of cl 16.01 of the SPA for a period of three years but did not terminate the SPA and only terminated it after being made aware of the compensation that the second defendant would pay to the landowner for the acquisition of a portion of the said land; (B) upon being notified by the second defendant of the acquisition of a portion of the said land, it was the first defendant's contractual duty under cl 15.01(b) of the SPA to notify the second defendant of the plaintiff's interest in the said land; (C) despite the acquisition of a portion of the said land, the plaintiff had elected to continue with the completion of the SPA; (D) the first defendant could fulfil the second condition precedent within the extended time given by the plaintiff to the first defendant; and (E) the termination of the SPA by the first defendant, purportedly, under cl 4.01 of the SPA was mala fide and unlawful. The first defendant submitted the following: (I) the first defendant neither had knowledge of the private caveat entered on the title of the said land upon the application of the plaintiff nor did he instruct his conveyancing solicitors to write to the plaintiff's conveyancing solicitors to obtain the caveators consent for the application by the first defendant for the State Authority's consent to sell and transfer the said land to the plaintiff; (II) upon learning, albeit some three years later, that the plaintiff had breached cl 16.01 of the SPA, by causing the private caveat to be entered on the title of the said land, the defendant was entitled to terminate the SPA and forfeit a sum of RM 185,571.40, being 10% of the purchase price, from the earnest deposit, as the agreed liquidated damages under cl 4.01 of the SPA; (III) the SPA was frustrated as it was incapable of performance due to the repeated failures by the first defendant to secure the land committee's consent to sell and transfer the said land to the plaintiff; and (IV) the SPA had also become void as it was impossible for the first defendant to fulfil the second condition precedent due to the ground given by the Director of Lands and Mines for the rejection of the second appeal.

Held, allowing the plaintiff's claim in parts with costs of RM30,000

- (1) The plaintiff had paid a total sum of RM 764,732 towards the purchase of the said land under the SPA, which the first defendant has agreed to sell to the plaintiff at the purchase price of RM1,855,714. Further, the plaintiff was also able and willing to complete the SPA upon the first defendant fulfilling the second condition precedent under cl 2.1(b) of the SPA. Therefore, the plaintiff had a beneficial interest in the said land and also a pre-registration contractual right to the said land that arose from the SPA. Section 323(1)(a) and (1)(b) of the National Land Code

- A recognised that unregistrable interests in land need protection pending registration. As the plaintiff had a caveatable interest in the said land, it may lodge a private caveat on the title to the said land to protect its right to the unregistered registrable interest in the said land while the sale and purchase transaction was pending completion (see paras 104–106 &
- B 113).
- (2) If the first defendant had, genuinely, wanted to terminate the SPA based on the breach of cl 16.01 of the SPA by the plaintiff in lodging the private caveat on the title of the said land before the first defendant had secured the land committee’s consent for the transfer of the said land to the plaintiff, he ought to have acted, immediately. In not taking that
- C immediate action and in requesting to be supplied by the plaintiff’s conveyancing solicitors with the caveators consent to enable the presentation by the first defendant of the application for consent to transfer and to charge to the land committee, the first defendant had
- D varied cl 16.01 of the SPA in accordance with cl 20.04 of the SPA or waived the strict compliance of that clause and could no longer insist on the strict compliance of that clause (see paras 125–126).
- (3) The termination of the SPA by the first defendant was mala fide and unlawful as after a lapse of almost three years and upon being notified of the acquisition of a portion of the said land by the government through the second defendant and knowing fully well that there would be compensation payable for the acquisition of a portion of the said land, the first defendant terminated the SPA pursuant to cl 4.0 of the SPA,
- E purportedly, due to the plaintiff’s breach of cl 16.01 of the SPA, viz solely, on the ground of the lodgement by the plaintiff of a private caveat on the title of the said land. The termination on the sole ground of a lodgement of a private caveat was mala fide and unlawful as the first defendant had
- F varied cl 16.01 and/or by conduct waived his rights by keeping quiet for almost three years and was therefore estopped from insisting on the strict compliance by the plaintiff of cl 16.01 and relying on cl 4.0 to terminate the SPA (see paras 130–132 & 140).
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- (4) The plaintiff, clearly, had the contractual right under cl 2.2 of the SPA to grant to the first defendant such extended time as agreed to, solely, by the plaintiff for the purpose of enabling the first defendant to secure the land committee’s consent to sell and transfer the said land to the plaintiff. It was the intention of the parties that time was not the essence of the contract and that the plaintiff was to be the sole decision maker in regard to the time for the completion of the SPA, in the event the two conditions precedent could not be fulfilled by the first defendant through no wilful
- H default and/or omission of the first defendant (see paras 147–148).
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- (5) Based on a letter dated 16 March 2016 by the plaintiff’s solicitors to the first defendant’s solicitors, notifying the first defendant’s solicitors of the

- land acquisition, the plaintiffs had duly and properly communicated the purchaser's right of election under cl 15.01 of the SPA to the first defendant (see paras 154–156). **A**
- (6) Having received the election of the plaintiff to complete the purchase of the said land notwithstanding the acquisition of a portion thereof, it was incumbent upon the first defendant to comply with his obligations under cl 15.01(b) of the SPA, which he, completely, ignored and/or failed to comply. As at the date of the filing of the writ and statement of claim, the first defendant had yet to comply with the plaintiff's solicitors letter dated 16 March 2016, notifying the first defendant, through the first defendant's solicitors, of the plaintiff's election to complete the SPA despite the acquisition of a portion of the said land (see paras 159–160). **B**
- (7) The compensation awarded by the second defendant ought, in the circumstances of this case, to be held by the Kuala Lumpur High Court NCV 1 and released, accordingly, upon receipt of the decision of the Director of Lands and Mines on a new application submitted by the first defendant to the Director of Lands and Mines to secure the land committee's consent to transfer the said land on the tenth year of the first defendant's ownership of the said land, which falls on 15 April 2023 (see para 161). **C**
- (8) The lodgement of the private caveat amounted to a breach of cl 16.01 of the SPA because of the clear wording of the said clause. However, since cl 16.01 of the SPA was varied in writing pursuant to cl 20.04 of the SPA, the first defendant was not entitled to terminate the SPA under cl 4.01 of the SPA on the ground that the plaintiff breached cl 16.01 of the SPA (see paras 162–164). **D**
- (9) The SPA was not frustrated to the ground given by the Director of Lands and Mines for the rejection of the second appeal based on the clear wording used by the parties in cl 2.2 of the SPA, the intention of the parties was that as long as the plaintiff was willing to extend the six months period stipulated therein to enable the first defendant to fulfill the two conditions precedent of the SPA, the first defendant could not terminate the SPA on the ground of frustration. This was because: (a) there was no option given to the first defendant to terminate the SPA due to the non-fulfilment of the two conditions precedent by the first defendant; and (b) it was the plaintiff, which had paid for the premium in full, the additional premium and all the expenses for the alienation of the said land to the first defendant by the land committee. So the first defendant was contractually obliged to perform his side of the bargain by making appeal after appeal in order to, ultimately, secure the land committee's consent to sell and transfer the said land to the plaintiff or alternatively to wait until the lapse of the ten years period and to submit **E**
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- A a new application to secure the land committee's consent to sell and transfer the said land to the plaintiff (see paras 167–169).
- (10) Even though the performance of a conditional contract was suspended until the condition was performed, whereupon the party in breach would be liable to the innocent party, the parties to the conditional contract were not allowed under s 33(a) of the Contracts Act 1950 to rely from it until it could be definitely ascertained that the condition could not be fulfilled (see para 176).
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- C (11) The SPA was still valid and subsisting although the performance of the SPA by the transfer of the said land by the first defendant to the plaintiff was suspended as the agreed extension of time given by the plaintiff to the first defendant to effect compliance of the second condition precedent had not expired (see para 187).
- D (12) Even though the court cannot grant an order of specific performance to compel the first defendant to transfer the said land to the plaintiff upon the plaintiff paying the balance purchase price to the first defendant as the SPA was a conditional contract and the second condition precedent had not yet been fulfilled by the first defendant, the court ought to grant to the plaintiff the reliefs sought as prayed in para 33(a), (b) and (f) of the plaintiff's re-amended statement of claim as the plaintiff was ready, willing and able to continue and complete the transaction of the sale and purchase of the said land. The first defendant was entitled to an order of specific performance to compel the first defendant to perform its contractual obligation to the plaintiff as agreed between them in cl 2.2 of the SPA to secure the land committee's consent for the transfer of the said land to the plaintiff (see paras 196–197).
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[Bahasa Malaysia summary]

- G Ini merupakan tindakan plaintif untuk satu perisytiharan seperti yang berikut: (a) satu perisytiharan bahawa penamatan defendan pertama untuk satu perjanjian jual beli bertarikh 9 Oktober 2012 yang dimasuki antara plaintif dan defendan pertama untuk satu bidang tanah ('SPA tersebut') melalui satu surat penamatan bertarikh 18 Mei 2016 adalah tidak berasas dan tidak mempunyai kesan undang-undang; dan (b) satu perintah untuk pelaksanaan spesifik untuk memaksa defendan pertama untuk mematuhi dengan arahan plaintif yang diberikan kepada defendan pertama selaras dengan klausa 2.2 perjanjian tersebut untuk membuat seberapa banyak rayuan yang perlu terhadap keengganan pihak berkuasa yang relevan untuk memberi keizinan kepada defendan pertama untuk memindah tanah tersebut kepada plaintif sehingga keizinan tersebut didapatkan oleh defendan pertama atau secara alternatif, untuk menunggu sehingga tempoh sepuluh tahun daripada tarikh tanah tersebut menjadi milik defendan pertama oleh kerajaan telah tamat sebelum membuat permohonan baru kepada pihak berkuasa yang berkenaan
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untuk mendapatkan keizinan untuk memindahkan tanah tersebut kepada A
plaintif. Plaintif merupakan pembeli tanah yang dipegang dibawah PN50866
Lot 168 Seksyen 88, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah
Persekutuan Kuala Lumpur ('tanah tersebut'), defendan pertama merupakan
penjual tanah tersebut. Fakta kes adalah bahawa selaras dengan kontrak
bersyarat iaitu perjanjian jual beli, defendan pertama bersetuju untuk menjual B
kepada plaintif tanah tersebut dengan harga RM1,855,714 selaras dengan
terma dan syarat yang dinyatakan didalamnya. Plaintif telah membayar
sejumlah RM764,732 untuk: (i) premium yang didahulukan untuk
pemindahan tanah tersebut sebagai deposit cengkeram untuk pembelian tanah C
tersebut; (ii) premium dan perbelanjaan untuk pemindahan milik tanah
tersebut; dan (iii) wang yang dibayar plaintif sebagai pendahuluan bagi pihak
defendan pertama untuk perbelanjaan yang ditanggung yang akan dikira
sebagai sebahagian daripada bayaran untuk harga jualan. Perjanjian jual beli
yang dipersetujui oleh pihak-pihak adalah bersyarat dengan pengeluaran D
dokumen hak milik keluaran didaftarkan atas nama defendan pertama dan
defendan pertama berjaya mendapatkan keizinan pihak berkuasa negeri untuk
memindahkan tanah tersebut kepada plaintif ('dua prasyarat'). Prasyarat
pertama telah dipenuhi dan ianya menantikan prasyarat kedua yang tidak
boleh dipenuhi oleh defendan pertama. Sebelum defendan pertama dapat E
memenuhi prasyarat kedua, plaintif telah memfailkan satu kaveat persendirian
atas hak milik tanah tersebut, yang mana peguam defendan pertama gagal
untuk membantah bagi pihak defendan pertama kepada penyerahan kaveat
persendirian tersebut. Defendan pertama kemudiannya memohon pada
20 Jun 2013 kepada Pengarah Tanah dan Galian untuk mendapatkan izin F
untuk memindah tanah tersebut kepada plaintif yang kemudiannya ditolak.
Selaras dengan klausa 2.2 perjanjian jual beli, sekiranya kedua prasyarat tidak
boleh dipenuhi oleh defendan pertama, plaintif boleh memilih untuk sama
ada: (1) memberikan defendan pertama satu pelanjutan masa sepertimana
dipersetujui oleh plaintif untuk menyebabkan pematuhan dua prasyarat; atau G
(2) membatalkan perjanjian jual beli tersebut. Plaintif dalam perkara ini
memilih pilihan pertama dan membenarkan lanjutan masa kepada defendan
pertama. Defendan pertama kemudiannya memasukkan permohonan kedua
pada 3 November 2014, yang mana defendan pertama tidak memaklumkan
keputusannya kepada plaintif. Pada 15 Februari 2016, plaintif menerima H
daripada defendan kedua sesalinan Borang E yang merupakan cadangan
pemerolehan sebahagian daripada tanah tersebut dan Borang F yang
merupakan makluman siasatan, kedua-duanya bertarikh 27 Januari 2016
berserta dengan sesalinan pemakluman siasatan kepada plaintif. Dalam
klausa 15.01(b) perjanjian jual beli tersebut, pihak-pihak bersetuju sekiranya I
plaintif memilih untuk melengkapkan pembelian tanah tersebut meskipun
pemerolehan apa-apa bahagian tanah tersebut dalam tempoh penyelesaian
atau pelanjutan tempoh penyelesaian (mengikut mana yang berkenaan),
defendan pertama akan, secara segera, memaklumkan pihak berkuasa relevan
yang memperoleh tanah tersebut berkenaan dengan kepentingan plaintif

- A dalam tanah tersebut dan pampasan akan menjadi milik plaintif tertakluk kepada pembayaran penuh baki harga belian oleh plaintif. Melalui surat bertarikh 18 Mei 2016 defendan pertama menamatkan perjanjian jual beli tersebut berdasarkan fakta plaintif telah melanggar klausa 16.01 perjanjian jual beli dan menyebabkan kaveat persendirian dimasukkan pada hak milik tanah tersebut.
- B Selepas pemfailan guaman ini, pendengaran untuk pemerolehan sebahagian daripada tanah tersebut dijalankan dihadapan defendan kedua, dan defendan pertama telah diawadkan pampasan sejumlah RM1,287,191.78. Plaintif telah memohon kepada Mahkamah Tinggi Kuala Lumpur untuk ianya memutuskan pihak mana yang berhak dibawah perjanjian jual beli kepada pampasan diawadkan defendan kedua dan Mahkamah Tinggi Kuala Lumpur NCVC 1, yang mendengar permohonan tersebut menantikan keputusan mahkamah ini dalam kes ini. Pihak-pihak bersetuju kepada pampasan untuk didepositkan ke Mahkamah Tinggi Kuala Lumpur NCVC 1 menantikan penyelesaian guaman ini oleh mahkamah ini.
- D Plaintif telah berhujah seperti berikut: (A) pembatalan perjanjian jual beli oleh defendan pertama yang dikatakan dibawah klausa 4.01 perjanjian jual beli adalah salah kerana defendan pertama mengetahui pelanggaran klausa 16.01 perjanjian jual beli untuk tempoh tiga tahun tetapi tidak membatalkan perjanjian jual beli dan hanya menamatkannya selepas mengetahui mengenai pampasan yang defendan kedua akan bayar kepada pemilik tanah untuk pemerolehan sebahagian daripada tanah tersebut; (B) selepas dimaklumkan oleh defendan kedua berkenaan dengan pemerolehan tanah, ianya merupakan tanggungjawab kontraktual defendan pertama dibawah klausa 15.01(b) perjanjian jual beli tersebut untuk memaklumkan defendan kedua berkenaan dengan kepentingan plaintif atas tanah tersebut; (C) walaupun pemerolehan sebahagian daripada tanah tersebut, plaintif telah memilih untuk meneruskan dengan penyelesaian perjanjian jual beli tersebut; (D) defendan pertama boleh memenuhi prasyarat kedua dalam tempoh lanjutan masa yang diberikan plaintif kepada defendan pertama; dan (E) pembatalan perjanjian jual beli oleh defendan pertama, kononnya dibawah klausa 4.01 perjanjian jual beli tersebut adalah mala fide dan tidak sah disisi undang-undang. Defendan pertama telah berhujah seperti berikut: (I) defendan pertama tiada pengetahuan mengenai kaveat persendirian yang dimasukkan pada hak milik tanah tersebut atas permohonan plaintif dia juga tidak mengarahkan peguam pindah milik untuk menulis kepada peguam pindahmilik plaintif untuk mendapatkan keizinan pemegang kaveat untuk permohonan defendan pertama untuk izin pihak berkuasa untuk menjual dan memindahkan tanah tersebut kepada plaintif; (II) selepas mengetahui, walaupun tiga tahun kemudian, bahawa plaintif telah melanggar klausa 16.01 perjanjian jual beli tersebut, dengan menyebabkan kaveat persendirian untuk dimasukkan pada hak milik tanah tersebut, defendan berhak untuk membatalkan perjanjian jual beli dan dilucut hak sejumlah RM185,571.40, yang merupakan 10% daripada harga belian, daripada deposit cengkeram, sepertimana ganti rugi jumlah tertentu yang telah dipastikan dibawah klausa 4.01 perjanjian jual beli tersebut; (III) perjanjian

jual beli tersebut telah digagalkan kerana ianya tidak boleh dilaksanakan kerana kegagalan berterus defendan pertama untuk mendapatkan keizinan jawatankuasa tanah untuk menjual dan memindahkan tanah tersebut kepada plaintif; dan (IV) perjanjian jual beli tersebut terbatal kerana ianya adalah mustahil untuk defendan pertama untuk memenuhi prasyarat kedua atas alasan yang diberikan oleh pengarah tanah dan galian untuk penolakan rayuan kedua.

Diputuskan, membenarkan sebahagian daripada tuntutan plaintif dengan kos RM30,000:

- (1) Plaintif telah membayar sejumlah RM764,732 terhadap pembelian tanah tersebut dibawah perjanjian jual beli, yang mana defendan pertama telah bersetuju untuk menjual kepada plaintif di harga belian iaitu RM1,855,714. Lanjutan itu, plaintif juga boleh dan sanggup untuk melengkapkan perjanjian jual beli tersebut diatas kesanggupan defendan pertama dibawah klausa 2.1(b) perjanjian jual beli tersebut. Oleh itu, plaintif mempunyai kepentingan benefisial dalam tanah tersebut dan juga satu pra-perjanjian hak kontraktual yang timbul daripada perjanjian jual beli tersebut. Seksyen 323(1)(a) dan (b) Kanun Tanah Negara menerima bahawa kepentingan yang tidak boleh didaftarkan dalam tanah memerlukan perlindungan sementara menantikan pendaftaran. Atas sebab plaintif mempunyai kepentingan yang boleh didaftarkan atas tanah tersebut, plaintif boleh mendaftarkan kaveat persendirian pada hak milik tanah tersebut untuk melindungi haknya kepada kepentingan yang boleh didaftarkan yang tidak boleh didaftarkan pada tanah tersebut sementara transaksi jual beli tersebut menantikan penyelesaiannya (lihat perenggan 104–106 & 113).
- (2) Sekiranya defendan pertama benar-benar berniat untuk membatalkan perjanjian jual beli berdasarkan pelanggaran klausa 16.01 perjanjian jual beli boleh atas sebab plaintif pertama memasukkan kaveat persendirian pada hak milik tanah tersebut sebelum defendan pertama mendapatkan izin jawatankuasa tanah untuk memindahkan tanah tersebut kepada plaintif, defendan pertama sepatutnya bertindak segera. Dalam tidak mengambil tindakan segera dan dalam memohon untuk dibekalkan oleh peguam pindah milik plaintif dengan keizinan pemegang kaveat untuk membolehkan pembentangan oleh defendan pertama untuk permohonan keizinan untuk memindahkan dan mencagarkan kepada jawatankuasa tanah, defendan pertama telah menukar klausa 16.01 perjanjian jual beli tersebut selaras dengan klausa 20.04 perjanjian jual beli tersebut atau mengetepikan pematuhan teguh klausa tersebut dan tidak lagi boleh menegaskan agar klausa tersebut dipatuhi secara teguh (lihat perenggan 125–126).
- (3) Pembatalan perjanjian jual beli tersebut oleh defendan pertama adalah

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- A mala fide dan tidak sah di sisi undang-undang selepas tempoh tiga tahun berlaku dan selepas dimaklumkan oleh pemerolehan sebahagian daripada tanah tersebut oleh kerajaan melalui defendan kedua dan mengetahui bahawa ada pampasan yang akan dibayar untuk pemerolehan sebahagian daripada tanah tersebut, defendan pertama
- B membatalkan perjanjian jual beli selaras dengan klausa 4.0 perjanjian jual beli tersebut, kononnya atas pelanggaran klausa 16.01 perjanjian jual beli tersebut semata-mata atas alasan pendaftaran kaveat persendirian plaintif atas hak milik tanah tersebut adalah mala fide dan tidak sah disisi undang-undang kerana defendan pertama telah mengubah klausa 16.01
- C dan/atau melalui pelakuan telah mengetepikan haknya dengan berdiam diri untuk tempoh hampir tiga tahun dan oleh itu adalah diestop daripada menegaskan pematuhan tegas plaintif klausa 16.01 dan bergantung kepada klausa 4.0 untuk membatalkan perjanjian jual beli tersebut (lihat perenggan 130–132 & 140).
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- (4) Adalah jelas bahawa plaintif mempunyai hak kontraktual dibawah klausa 2.2 perjanjian jual beli untuk memberikan defendan pertama pelanjutan masa sepertimana dipersetujui oleh plaintif untuk tujuan membenarkan defendan pertama mendapatkan izin jawatankuasa tanah untuk menjual dan memindahkan tanah tersebut kepada plaintif. Adalah niat pihak-pihak pada bahawa waktu bukanlah merupakan asas kontrak dan plaintif adalah pembuat keputusan tunggal berkenaan dengan tempoh masa untuk penyelesaian perjanjian jual beli tersebut, sekiranya kedua-dua prasyarat tidak boleh dipenuhi defendan pertama tidak disebabkan kegagalan sengaja dan/atau pengenetepian defendan pertama (lihat perenggan 147–148).
- E
- F
- (5) Berdasarkan surat bertarikh 16 Mac 2016 oleh peguam pindah milik plaintif kepada peguam defendan pertama, memaklumkan peguam defendan pertama berkenaan dengan pemerolehan tanah tersebut, plaintif telah memaklumkan hak memilih pembeli dibawah klausa 15.01 perjanjian jual beli tersebut kepada defendan pertama (lihat perenggan 159–160).
- G
- H
- (6) Setelah menerima pilihan plaintif untuk melengkapkan pembelian tanah tersebut meskipun pemerolehan sebahagian daripadanya, adalah menjadi perlu defendan pertama memenuhi tanggungjawabnya di bawah klausa 15.01(b) perjanjian jual beli tersebut, yang mana telah ditidak pedulikan dan /atau gagah untuk dipatuhi/ pada tarikh pemfailan writ dan pernyataan tuntutan, defendan pertama masih belum mematuhi
- I dengan surat peguam plaintif bertarikh 16 Mac 2016, memaklumkan defendan pertama, melalui peguam defendan pertama, untuk pilihan plaintif untuk melengkapkan perjanjian jual beli tersebut meskipun pemerolehan sebahagian daripada tanah tersebut (lihat perenggan 159–160).

- (7) Pampasan yang diawadkan oleh defendan kedua sepatutnya dalam keadaan kes ini, dipegang oleh Mahkamah Tinggi Kuala Lumpur NCVC 1 dan dilepaskan atas penerimaan keputusan pengarah tanah dan galian atas permohonan baru yang dibuat oleh defendan pertama kepada pengarah tanah dan galian untuk mendapatkan keizinan jawatankuasa tanah untuk memindahkan tanah tersebut pada tahun kesepuluh pemilikan defendan pertama atas tanah tersebut yang jatuh pada 15 April 2023 (lihat perenggan 161). A B
- (8) Pendaftaran kaveat persendirian terjumlah kepada pelanggaran klausa 16.01 perjanjian jual beli tersebut atas penggunaan perkataan jelas klausa tersebut. Namun, memandangkan klausa 16.01 perjanjian jual beli tersebut diubah secara bertulis selaras dengan klausa 20.04 perjanjian jual beli tersebut, defendan pertama tidak berhak untuk membatalkan perjanjian jual beli dibawah klausa 4.01 perjanjian jual beli tersebut atas alasan plaintif melanggar klausa 16.01 perjanjian jual beli tersebut (lihat perenggan 162–164). C D
- (9) Perjanjian jual beli tersebut tidak digagalkan atas alasan yang diberikan oleh pengarah tanah dan galian untuk penolakan rayuan kedua berdasarkan perkataan jelas yang digunakan oleh pihak-pihak dalam klausa 2.2 perjanjian jual beli tersebut, dan niat pihak-pihak adalah selagi mana plaintif sanggup untuk melanjutkan tempoh enam bulan yang ditetapkan didalamnya untuk membolehkan defendan pertama untuk memenuhi kedua-dua prasyarat perjanjian jual beli tersebut, defendan pertama tidak boleh membatalkan perjanjian jual beli tersebut atas alasan kegagalan. Ini adalah kerana: (i) tiada pilihan diberikan kepada defendan pertama untuk membatalkan perjanjian jual beli tersebut atas kegagalan untuk melaksanakan dua prasyarat oleh defendan pertama; dan (ii) plaintif merupakan pihak membayar premium secara penuh, dan premium tambahan dan semua perbelanjaan untuk pemindahan tanah tersebut kepada defendan pertama oleh jawatankuasa tanah. Oleh itu, defendan pertama mempunyai tanggungjawab kontraktual untuk melaksanakan bahagiannya dengan membuat rayuan dengan tujuan, untuk akhirnya, mendapatkan keizinan jawatankuasa tanah untuk menjual dan memindahkan tanah tersebut kepada plaintif atau secara alternatif untuk menunggu penamatan tempoh sepuluh tahun dan untuk membuat permohonan baru untuk mendapatkan keizinan jawatankuasa tanah untuk menjual dan memindahkan tanah tersebut kepada plaintif (lihat perenggan 167–169). E F G H
- (10) Walaupun pelaksanaan kontrak bersyarat ditangguhkan sehingga prasyarat dilaksanakan, yang mana pihak yang melanggar kontrak tersebut akan menjadi bertanggungjawab kepada pihak tidak bersalah, pihak-pihak kepada kontrak bersyarat tidak dibenarkan dibawah s 33(a) Akta Kontrak 1950 untuk bergantung kepadanya sehingga ianya boleh I

- A ditenentukan bahawa prasyarat itu tidak boleh dipenuhi (lihat perenggan 176).
- (11)Perjanjian jual beli tersebut masih sah dan berterusan walaupun pelaksanaan perjanjian jual beli berkenaan pemindahan tanah tersebut
- B oleh defendan pertama kepada plaintif ditangguhkan sepertimana perjanjian tempoh masa yang setuju untuk diberikan oleh defendan pertama untuk menyebabkan pematuhan prasyarat kedua tidak luput (lihat perenggan 187).
- (12)Walaupun mahkamah tidak boleh memberikan perintah pelaksanaan khusus untuk memaksa defendan pertama untuk memindahkan tanah tersebut kepada plaintif dan selepas plaintif membayar baki harga belian kepada defendan pertama memandangkan perjanjian jual beli tersebut merupakan kontrak bersyarat dan prasyarat kedua boleh lagi dipenuhi oleh defendan pertama, mahkamah sepatutnya memberikan kepada
- D plaintif relif yang dipohon sepertimana perenggan 33(a), (b) dan (f) oleh pernyataan tuntutan yang dipinda semula plaintif memandangkan plaintif bersedia dan sanggup untuk meneruskan dan melengkapkan transaksi jual beli tanah tersebut. Defendan pertama berhak untuk
- E mendapatkan satu perintah pelaksanaan khusus untuk memaksa defendan pertama untuk melaksanakan tanggungjawab kontraktualnya kepada plaintif sepertimana dipersetujui dalam klausa 2.2 perjanjian jual beli tersebut untuk mendapatkan keizinan jawatankuasa tanah untuk pemindahan tanah tersebut kepada plaintif (lihat perenggan 196–197).]
- F

Notes

- For cases on caveatable interest, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2757–2760.
- For cases on conditional contract, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7045–7052.
- G For cases on variation, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7818–7819.

Cases referred to

- H *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; [1980] AC 331, PC (refd)
- J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, HC (refd)
- Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559, HC (refd)
- I *Liputan Canggih Sdn Bhd v Sonstar Sdn Bhd* [2016] MLJU 1628, CA (distd)
- National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ Rep 282, FC (folld)
- Oertel v Hordern* (1902) 2 SR (NSW) Eq 37, SC (refd)

- Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1977] AC 302, PC (refd) A
- T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b; [1980] AC 497, PC (refd)
- TSM Development Pte Ltd v Leonard Stephanie Celine nee Pereira* [2005] 4 SLR 721, CA (refd) B
- United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30; [2006] 4 SLR 884, CA (refd)
- Wong Kok Chin v Mah Ten Kui Joseph* [1992] 2 SLR 161, CA (refd)
- Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd* [2013] 5 MLJ 677; [2010] 1 LNS 1069, CA (refd) C

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016)

Contracts Act 1950 s 33, 33(a)

Land Acquisition Act 1960 Forms E, F D

National Land Code ss 323(1)(a), (1)(b), 326, 326(2), Form 19C

Rules of Court 2012 O 20 r 1(1), O 59 r 7(4)

Bernard Scott (Sault Scott & Co) for the plaintiff.

Masturina bt Mohamad Rodzi (Lim Hock Lee and Edwin with her) (Edwin Lim & Suren) for the first defendant. E

Su Geok Yiam J:

THE PLAINTIFF'S SUIT F

[1] On 5 July 2016, the plaintiff commenced this action against the first and second defendants, to seek for, inter alia, a declaration and an order of specific performance against the first defendant. G

[2] The declaration sought by the plaintiff is to declare that the termination by the first defendant of a sale and purchase agreement dated 9 October 2012 entered into between the plaintiff and the first defendant for a piece of land ('the SPA') a letter of termination dated 18 May 2016 is baseless and has no legal effect. H

[3] The order of specific performance sought by the plaintiff is to compel the first defendant to comply with the direction of the plaintiff given to the first defendant pursuant to cl 2.2 of the SPA to make as many appeals as are necessary against the refusal of the relevant authority to give its consent to the first defendant for the transfer of the piece of land to the plaintiff until the consent is secured by the first defendant or alternatively, to wait until a period of ten years from the date the piece of land was alienated to the first defendant by the government has lapsed before making a fresh application to the relevant I

A authority to secure its consent for the transfer of the piece of land to the plaintiff.

B [4] The plaintiff commenced this action a writ of summons dated 5 July 2016 ('the writ'), encl 1, and an undated statement of claim ('statement of claim'), encl 2, through the law firm of Messrs Sault Scott & Co ('the plaintiff's solicitors').

C [5] Subsequently, the plaintiff amended the statement of claim and re-amended the statement of claim under O 20 r 1(1) of the Rules of Court 2012 ('the RC 2012'). The plaintiff also amended the writ under O 20 r 1(1) of the RC 2012.

D [6] In para 33 of the re-re-amended statement of claim redated 21 July 2016 ('the re-re-amended statement of claim'), the plaintiff claims for the following reliefs in Malay:

- E (a) Deklarasi bahawa penamatan Perjanjian Jual Beli bertarikh 09.10.2012 yang ditandatangani di antara Plaintiff sebagai Pembeli dan Defendan Pertama sebagai Penjual oleh Defendan Pertama melalui surat bertarikh 18.05.2016 adalah tidak berasas dan tidak mempunyai kuasa undang-undang;
- F (b) Perintah pelaksanaan spesifik (specific performance) dikeluarkan terhadap Defendan Pertama untuk mematuhi arahan Plaintiff di bawah Klausa 2.2 Perjanjian Jual Beli bertarikh 09.10.2012 tersebut untuk membuat sebarang rayuan yang perlu terhadap penolakan kebenaran pindahmilik kepada pihak berkuasa yang relevan sehingga kebenaran diperolehi atau secara alternative untuk menunggu tempoh 10 tahun yang ditetapkan lupus sebelum mengemukakan permohonan yang baru untuk kebenaran pindahmilik Hartanah tersebut kepada Plaintiff;
- G (c) Deklarasi bahawa Plaintiff telah memberikan Defendan Pertama notis yang sepatutnya kepada Defendan Pertama mengenai pilihan mereka untuk meneruskan dengan Perjanjian Jual Beli bertarikh 09.10.2012, di bawah Klausa 15.01 Perjanjian Jual Beli tersebut;
- H (d) Deklarasi bahawa Defendan Pertama gagal mematuhi Klausa 15.01(b) Perjanjian Jual Beli bertarikh 09.10.2012 tersebut apabila gagal memaklumkan pihak berkuasa berkenaan mengenai kepentingan Plaintiff ke atas hartanah tersebut;
- I (e) Deklarasi bahawa Defendan Pertama gagal mematuhi Klausa 15.01(b) Perjanjian Jual Beli bertarikh 09.10.2012 tersebut apabila gagal mengambil maklum bahawa pampasan pengambilan Hartanah tersebut adalah kepunyaan Plaintiff dan harus dibayar kepada Plaintiff tertakluk kepada bayaran penuh Baki Harga Belian oleh Plaintiff kepada Defendan Pertama.
- (f) Kos;

- (g) Apa-apa perintah lain yang dianggap suai manfaat oleh Mahkamah yang Mulia ini. A

[7] In English, the reliefs claimed by the plaintiff in para 33 of the re-re-amended statement of claim are as follows: B

- (a) a declaration that the termination by the first defendant of the SPA, which was executed by the plaintiff as purchaser and the first defendant as vendor a letter of termination dated 18 May 2016 has no basis and no legal effect; B
- (b) an order of specific performance against the first defendant to compel the first defendant to comply with the plaintiff's direction given pursuant to cl 2.2 of the SPA to make as many appeals as are necessary against the refusal of the relevant authority to give its consent to the first defendant for the transfer of the piece of land to the plaintiff until the consent is secured by the first defendant or alternatively, to wait until a period of ten years from the date the piece of land was alienated to the first defendant by the government has lapsed before making a fresh application to the relevant authority to secure its consent for the transfer of the piece of land to the plaintiff; C
D
E
- (c) a declaration that the plaintiff has given to the first defendant the requisite notice pursuant to cl 15.01 of the SPA concerning the plaintiff's election to continue with the completion of the SPA (despite the proposed acquisition of a portion of the piece of land);
- (d) a declaration that the first defendant failed to comply with cl 15.01(b) of the SPA when he failed to notify the relevant authority concerning the plaintiff's interest in the piece of land; F
- (e) a declaration that the first defendant failed to comply with cl 15.01(b) of the SPA when he failed to appreciate that the compensation for the acquisition of a portion of the piece of land belongs to the plaintiff and ought to be paid to the plaintiff subject to the plaintiff paying the balance purchase price to the first defendant; G
- (f) costs; and H
- (g) any other order deemed fit and appropriate by the court.

[8] In the re-re-amended statement of claim, the plaintiff has abandoned the following reliefs, initially, claimed by the plaintiff: I

- (a) an order of specific performance against the first defendant to compel the first defendant to comply with cl 15.01(b) of the SPA in the following terms:
- (i) the first defendant to give notice to the *Pentadbir Tanah Wilayah*

- A** *Persekutuan* within three working days from the date of this order concerning the plaintiff's interest in the piece of land; and
- (ii) thereafter, in relation to all matters involving the acquisition of a portion of the piece of land, the first defendant shall act in accordance with the directions of and subject to the costs that will be borne by the plaintiff and shall do all acts that are appropriate and reasonable that are required by the plaintiff to obtain the best compensation (for the acquisition of a portion of the piece of land);
- B**
- C** (b) an injunction against the second defendant to restrain the second defendant from paying any compensation (awarded) for the acquisition of a portion of the piece of land directly to the first defendant but to pay the same into the bank account of the plaintiff's solicitors as stakeholders pending the outcome of this action;
- D** (c) an order for the first defendant to pay into court pending the determination of this action, all of the compensation, if the same is awarded to the first defendant by the second defendant, for the acquisition of a portion of the piece of land;
- E** (d) an order giving full powers to the (plaintiff's) solicitors, who are the stakeholders, to release the compensation to the plaintiff, if the outcome of this action favours the plaintiff, or to the first defendant, if the outcome of this action favours the first defendant;
- F** (e) damages to be assessed; or
(f) a date fixed for the assessment of damages; and
(g) interest on the assessed damages at the rate of 5%pa.

G PARTIES IN THE PLAINTIFF'S SUIT

[9] Asal Anggun Development Sdn Bhd, the plaintiff, is a company that is incorporated under the Companies Act 1965.

H [10] The plaintiff has a registered address at No 1-47, SP 2, Taman Segar Perdana, 43200 Cheras, Selangor Darul Ehsan.

[11] The plaintiff is the purchaser of a place of land held under PN50866 Lot 168 Seksyen 88, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the said land').

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[12] Amiruddin bin Abdul Rahman, the first defendant, is a Malaysian citizen with an address for service at C320, Sri Wira Apartment Jalan Ukay Perdana 2, Ukay Perdana Ulu Kelang, Selangor Darul Ehsan.

[13] The first defendant is the vendor of the said land. A

[14] *Pentadbir Tanah Wilayah Persekutuan* in Malay or Land Administrator for the Federal Territory in English, is the second defendant.

THE FIRST DEFENDANT'S APPEARANCE AND STATEMENT OF DEFENCE B

[15] On 16 August 2016, the first defendant filed his defence dated 16 August 2016, encl 7, through the law firm of Messrs Edwin Lim & Suren ('the first defendant's solicitors'). C

[16] In his statement of defence, the first defendant avers, inter alia, as follows in his defence to the plaintiff's claim:

(a) the first defendant is entitled to terminate the SPA under cl 4 of the SPA, vis cl 4.01, due to the plaintiff's breach of cl 16 of the SPA, vis cl 16.01, when it caused a private caveat to be entered on the title of the said land before the first defendant had secured the state authority's consent for the sale and transfer of the said land by the first defendant to the plaintiff; D
E

(b) since the second condition precedent in the SPA was not fulfilled, the plaintiff has no caveatable interest in the said land and, hence, the private caveat ought to be removed;

(c) the sale of the said land to the plaintiff by the first defendant could not be completed under the SPA because the Director of Lands and Mines of the Federal Territory of Kuala Lumpur ('the Director of Lands and Mines') did not consent to the sale and transfer of the said land to the plaintiff; and F

(d) due to the ground given by the Director of Lands and Mines for the rejection of the second appeal that the first defendant's ownership of the said land, which is government land alienated to the first defendant, is less than ten years ('the ground'), the SPA is void as it is incapable of performance by the first defendant. G
H

[17] After filing his defence on 16 August 2016, on 11 September 2016, the first defendant entered his appearance by filing his memorandum of appearance dated 11 September 2016, encl 24, through the first defendant's solicitors. I

A THE PLAINTIFF'S REPLY TO THE FIRST DEFENDANT'S
STATEMENT OF DEFENCE

B [18] On 30 August 2016, the plaintiff filed its reply dated 30 August 2016 ('reply'), encl 8, to the first defendant's statement of defence.

[19] Subsequently, the plaintiff amended its reply under O 20 r 1(1) of the RC 2012. On 27 January 2017, the plaintiff filed its amended reply but it was not redated ('amended reply').

C [20] In its amended reply, the plaintiff avers, inter alia, as follows to the defendant's statement of defence:

D (a) the plaintiff has a caveatable interest in the said land as the plaintiff has paid to the first defendant a sum of RM521,378.50, which exceeds the sum of RM243,293.50, being the earnest deposit paid by the plaintiff to the first defendant under the SPA (see para 2);

E (b) since the plaintiff has granted an extension of time to the first defendant under cl 2.2 of the SPA to fulfil the second condition precedent of the SPA and this issue has already been decided by the Kuala Lumpur High Court in the High Court Civil Suit No 22NCVC-516-11 of 2014, this issue is res judicata (see para 6.5(iii));

F (c) hence, the first defendant is not entitled to terminate the SPA (vide his solicitors' letter dated 18 May 2016) (see para 6.5(iii));

(d) cl 16.01 of the SPA is inapplicable because the parties have varied cl 16 of the SPA in writing vide an exchange of letters between the (conveyancing) solicitors of the parties (see para 3b);

G (e) the first defendant did not deny that Messrs KS Lam & Co were acting as his (conveyancing) solicitors at the material time (see para 5.4); and

H (f) hence, any knowledge of the variation of cl 16.01 of the SPA on the part of the first defendant's (conveyancing) solicitors must be imputed to the first defendant (see para 5.4).

THE SECOND DEFENDANT'S APPEARANCE

I [21] On 11 August 2016, the second defendant entered its appearance by filing its memorandum of appearance dated 11 August 2016, encl 6, through the Attorney General's Chambers Malaysia ('the AGC').

[22] The second defendant, which was sued as a nominal defendant, did not file a statement of defence to the plaintiff's claim.

THE FULL TRIAL

[23] On 16 November 2017, the full trial commenced. It continued on 17 November 2017. It concluded on 17 November 2017.

[24] The documents, which were filed by the parties for use in the full trial pursuant to the pre-trial case management ('PTCM') directions given by the court were marked on the first day of the full trial as follows:

No	Document	Enclosure	Marking
1	Bundle of pleadings	Enclosure (29)	Bundle 'A'
2	Revised Common Bundle of Documents (Volume 1)	Enclosure (51)	Bundle 'B'
3	Revised Common Bundle of Documents (Volume 2)	Enclosure (51)	Bundle 'C'
4	Statement of Agreed Facts	Enclosure (44)	'D'
5	Plaintiff's Re-Revised Issues To Be Tried	Enclosure (48)	'E'
6	The first defendant's Re-Re-Revised Issues To Be Tried	Enclosure (47)	'F'
7	Summary of the Plaintiff's Case	Enclosure (30)	'G'
8	The first defendant's Case Summary	Enclosure (39)	'H'
9	Ringkasan Kes Defendan Kedua	Enclosure (42)	'I'
10	Plaintiff's Opening Statement	Enclosure (46)	'J'
11	The first defendant's Opening Statement	Enclosure (37)	'K'

	No	Document	Enclosure	Marking
A	12	Revised List of plaintiff's Witnesses	Enclosure (54)	'L'
B	13	List of Witness (first defendant)	Enclosure (35)	'M'

[25] The parties called three witnesses, altogether.

C [26] The plaintiff called two witnesses. They are as follows:

(a) Mr See Kok Loong, the real estate agent, who was appointed by the plaintiff to act for the plaintiff, in the plaintiff's purchase of the said land from the first defendant, as PW1; and

D (b) Mr Koay Eng Hooi, an advocate and solicitor, who is also a director of the plaintiff, who had appointed PW1 to act on behalf of the plaintiff in the plaintiff's purchase of the said land from the first defendant, as PW2.

E [27] PW1 gave his evidence in his examination-in-chief vide a witness statement marked as P1 by the court. In answer to '2. Q: What role did you play in the transaction between the parties?' PW1 stated, inter alia, as follows:

F A: ... From the start of the negotiations leading to the agreement to purchase by the plaintiff, both the Vendor and the plaintiff had wanted the sale and purchase deal to go through. And that was the reason the plaintiff agreed and readily committed more than 10% of the purchase price to assist the first defendant in making SoM payments concerning the property for the first defendant.

G [28] In answer to '3Q: On the issue of the application for consent to transfer, do you have any knowledge why application for consent to transfer was rejected?' PW1 stated as follows:

H A: I was informed by Mr Koay that the application was rejected and the reason was that the sale was from a Bumiputera to a non Bumiputera company. He later informed me that an appeal made by the Vendor was also rejected and the reason this time was that as it was a tanah bermilik kerajaan, it could not be transferred for a period of ten (10) years.

I As the restriction of interest stated on the Title did not have these restrictions of bumiputera lot or lock in period of 10 years before the land can be transferred, the parties agreed at the meeting that further appeals will be lodged by the Vendor until the Consent to Transfer was obtained.

[29] PW2 gave his evidence in his examination-in-chief vide a witness statement marked as P2 by the court. In answer to '6. Q: So what happened next?' PW2 stated, inter alia, as follows:

A. ... Under Clause 2.2 of the Sale and Purchase Agreement, the plaintiff is entitled to grant the first defendant such extension of time to fulfill the said condition precedent to obtain the consent to transfer and in accordance with that Clause 2.2, the first defendant has no rights as was done by him to terminate the Sale and Purchase Agreement on the ground that the consent cannot be obtained as the condition is not an impossibility. This however, was not the ground on which the first defendant subsequently terminated the Sale and Purchase Agreement.

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As a matter of fact, this issue of extension of time to apply for the consent to transfer the title had been raised and decided previously by Justice Yeoh Wee Siam at the Kuala Lumpur High Court in a civil proceedings instituted by the plaintiff against the first defendant *vide* Civil Suit No: 22NCVC-516-11/2-14 where the plaintiff's action *inter alia* to compel the first defendant to obtain the consent. I refer to Tab 11 Part B of the Revised Common Bundle of Documents for a copy of the Writ and Statement of Claim in that action.

C

The suit was struck out on application by the first defendant for being premature as the consent application had been made but the consent was pending at the time. Therefore, time is no more an issue between the parties.

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[30] The first defendant called one witness. The first defendant's sole witness is the defendant himself, who gave evidence, as DW1.

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[31] DW1 gave his evidence in his examination-in-chief *vide* a witness statement marked as D3 by the court. In answer to 'Q. 14: Kenapakah Perjanjian Jual Beli tersebut ditamatkan?' DW1 stated, *inter alia*, as follows:

A. Ada 2 sebab utama. Pertama, kerana Asal Anggun telah memungkiri Perjanjian Jual Beli tersebut dengan memasukkan kaveat ke atas tanah tersebut sebelum kebenaran pindahmilik diperolehi. Tindakan plaintiff memasukkan kaveat tersebut adalah bertentangan dengan klausa 16, Perjanjian Jual Beli.

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Kedua, Perjanjian Jual Beli tersebut tidak dapat diteruskan kerana Pejabat Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur telah 3 kali menolak permohonan saya untuk kebenaran pindahmilik. Berdasarkan justifikasi yang diberikan oleh pejabat tanah, saya tidak boleh memindahmilik tanah tersebut kepada sesiapaupun sehingga tahun 2021. Dan saya tidak tahu apa syarat-syarat baru yang akan dikenakan oleh Pejabat Pengarah Tanah dan Galian Wilayah Persekutuan selepas tahun 2012. Perjanjian Jual Beli telah dimasuki sejak 9/10/2012, kini telah 5 tahun berlalu, saya masih tidak dapat memperolehi kebenaran untuk pindahmilik daripada Pejabat Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur. Transaksi memang tidak dapat disempurnakan dan adalah tidak munasabah untuk saya terus menunggu dan merayu kepada Pengarah Tanah dan Galian lagi tanpa pengakhiran.

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[32] In answer to 'Q. 16: Apakah jawapan kamu terhadap tuntutan plaintiff terhadap kamu di sini?' DW1 stated as follows:

A. Plaintiff di sini telah memungkiri Perjanjian Jual Beli tersebut apabila plaintiff

A memasukkan kaveat ke atas tanah tersebut tanpa persetujuan saya. Oleh demikian, surat penamatan Perjanjian Jual Beli tersebut adalah sah.

Tambahan pula, Perjanjian Jual Beli tersebut telah menjadi mustahil untuk dilaksanakan. Keputusan pihak berkuasa tempatan tidak membenarkan tanah tersebut dipindahmilik dalam tempoh 10 tahun selepas pemberimilikan tanah adalah di luar kawalan saya.

Oleh itu, saya memohon agar tuntutan plaintiff di sini ditolak.

ISSUES FOR DETERMINATION OF THE COURT

C [33] The parties could not agree on common issues to be tried despite a direction given to the parties by the court during the PTCM to file them. Hence, both parties filed their, respective, issues to be tried.

D THE PLAINTIFF'S ISSUES FOR DETERMINATION OF THE COURT

[34] The plaintiff framed the following seven re-revised issues for the determination of the court:

- E** (1) whether the plaintiff has a caveatable interest in the said land?
- (2) whether the SPA has been varied in accordance with cl 20.04 of the SPA when by an exchange of letters dated 19 June 2013, the first defendant's solicitors requested to be supplied by the plaintiff's solicitors with the caveator's consent to enable the presentation by the first defendant of the application for consent to transfer and to charge to the relevant authority?
- F** (3) whether the termination of the SPA by the first defendant vide a letter dated 18 May 2016 on grounds of the entry of a private caveat upon the application by the plaintiff was mala fide and unlawful?
- G** (4) whether the plaintiff as the purchaser has the right under cl 2.2 of the SPA to grant to the first defendant such extended time as to enable the first defendant to secure the consent to transfer from the relevant authority?
- (5) whether the plaintiff as the purchaser of the said land has, duly and properly, communicated the purchaser's right of election under cl 15.01 of the SPA to the first defendant as the vendor of the said land?
- H** (6) whether the first defendant upon being notified of the plaintiff's election to complete the purchase of the said land notwithstanding the acquisition of any part thereof, has thereafter complied with his (the first defendant's) obligation under cl 15.01(b) of the SPA? and
- I** (7) whether the plaintiff is entitled to the reliefs prayed for in para 33(a)–(g) of the re-amended statement of claim?

THE FIRST DEFENDANT'S ISSUES FOR DETERMINATION OF COURT A

[35] The first defendant framed the following five re-re-revised issues for the determination of the court:

- (a) whether the termination of the SPA by the first defendant/vendor is mala fide and unlawful; B
- (b) whether the lodgment of the private caveat on the title of the said land by the plaintiff amounts to a breach of cl 16.01 of the SPA? C
- (c) whether the SPA is frustrated due to the ground given by the Director of Lands and Mines for the rejection of the first defendant's second appeal? D
- (d) whether the completion period of the SPA was extended by the parties? and D
- (e) whether the SPA is deemed terminated after the expiry of the agreed extension of time (if any) pursuant to cl 2.2 of the SPA? D

DECISION OF COURT DATED 8 FEBRUARY 2018 E

[36] On 8 February 2018, I ordered the plaintiff's claim in prayers (a) and (b) of the plaintiff's re-re-amended writ, encl 66, which correspond with prayers (a) and (b) of para 33 of the plaintiff's re-re-amended statement of claim, encl 67, allowed with costs. F

[37] I made no order on the plaintiff's prayers in (c), (d) and (e) of the plaintiff's re-re-amended writ, encl 66, which correspond with prayers (c), (d) and (e) of para 33 of the plaintiff's re-re-amended statement of claim. G

[38] I ordered the first defendant to pay a sum of RM30,000 as costs to the plaintiff. G

[39] I, further ordered the senior assistant registrar ('SAR') to issue the allocatur certificate in accordance with O 59 r 7(4) of the RC 2012. H

[40] I, finally, ordered that the allocatur fee must be paid before the fair copy of the order made that day can be filed in the court. H

REASONS FOR DECISION OF COURT DATED 8 FEBRUARY 2018 I

[41] Below are the reasons why I allowed in part the plaintiff's claim with costs of RM30,000. I

- A [42] On the issue of liability, I agreed with the submissions and further submissions of Mr Bernard Scott ('Mr Scott'), the plaintiff's learned counsel, that the court ought to grant to the plaintiff the reliefs prayed for by the plaintiff in (a), (b) and (c) of para 33 of the plaintiff's re-re-amended statement of claim, encl 67, based on the reasons given by him.
- B [43] On the issue of costs, I was of the view that a sum of RM30,000 is a reasonable amount of costs to be ordered against the first defendant after taking into consideration the submissions of Mr Scott, the plaintiff's learned counsel, and Mr Edwin Lim ('Mr Lim'), the first defendant's learned counsel, on the amount of costs to be ordered against the first defendant.
- C [44] Mr Scott prayed for costs of RM30,000.
- D [45] Mr Lim proposed costs of a sum of RM10,000 on the ground that this is a run of the mill matter involving a sale and purchase agreement for a piece of land.
- E [46] In reply, Mr Scott submitted that the sum of RM30,000 prayed for by him is fair and reasonable as there were two rounds of submissions and many high level authorities were cited by him on the issue whether the court ought to grant to the plaintiff in the instant case the remedy of specific performance of cl 2.2 of the SPA to compel the first defendant to obtain the consent from the relevant authority for the transfer of the piece of land to the plaintiff.
- F [47] I agreed with Mr Scott that this is not a run of the mill matter involving a simple sale and purchase agreement for a piece of land. I agreed with Mr Scott that the facts and circumstances of this case gave rise to some amount of complexity, which required more effort on his part.
- G [48] The complexity will become clear after I have dealt with the salient facts and the law and when I am giving my detailed reasons for each of the issues framed by the parties for the determination of the court.
- H SALIENT FACTS
- I [49] Below are the salient facts that have been agreed upon by the parties in their statement of agreed facts marked as 'D' by the court or averred in one party's pleadings and not disputed in the other party's pleadings or challenged by the other party in cross-examination during the full trial or have been proven by the evidence adduced by the plaintiff through the plaintiff's two witnesses (PW1 and PW2).
- [50] By a conditional contract dated 9 October 2012, vis the SPA, the first

defendant agreed to sell and the plaintiff agreed to buy the said land at the purchase price of RM1,855,714 ('the purchase price') in accordance with the terms and conditions stated therein. A

[51] The plaintiff has paid on behalf of the first defendant a sum of RM243,293.50, being the advance premium for the alienation of the said land to the second defendant, as the earnest deposit for the purchase of the said land ('the earnest deposit'). B

[52] Both parties were represented in the sale and purchase transaction of the said land by their, respective, conveyancing solicitors. C

[53] The law firm of Messrs David Gurupatham & Koay represented the plaintiff ('the plaintiff's conveyancing solicitors'), whilst the law firm of Messrs KS Lam & Co represented the first defendant ('the first defendant's conveyancing solicitors'). D

[54] In addition to the payment of the earnest deposit, the plaintiff also paid a total sum of RM518,202.50, being the premium and the expenses for the alienation of the said land to the first defendant, on two dates as follows: E

(1) on 5 October 2012, vis prior to the date of the execution of the SPA, the plaintiff paid the following items of expenses:

(a) Bayaran Premium dalam Borang 5A	RM 485,614.00	F
(b) Cukai Tanah Tahun Pertama	RM 583.00	
(c) Bayaran Ukur (Tidak Termasuk Tanda Sempadan)	RM 250.00	
(d) Bayaran Tanda Sempadan	RM 20.00	G
(e) Pendaftaran & Pengeluaran HM Tetap	RM 60.00	
(f) Pendaftaran & Pengeluaran HM Sementara	RM 60.00	

(2) on 18 March 2013, vis after the date of the execution of the SPA, the plaintiff paid on account of the first defendant the following items of expenses: H

(a) Bayaran Premium (Additional) dalam Borang 5A	RM 31,577.50	
(b) Cukai Tanah Perbezaan Keluasan	RM 38.00	
Jumlah	RM 518,202.50	I

[55] After the date of the execution of the SPA and upon the request of the first defendant, the plaintiff also paid, in advance, on behalf of the first defendant, a sum of RM3,236, which the first defendant agreed would be

A taken as part payment of the purchase price of the said land, for the following expenses:

	25.10.2012 – WCK Management	RM 2,650.00
	24.04.2013 – Yuran Pengikraran Akuan Berkanun – KS Lam & Co	RM 8.00
B	24.12.2013 – Yuran Pengikraran Akuan Berkanun	RM 4.00
	23.12.2013 – Salinan Diakui Sah Geran	RM 50.00
	23.04.2013 – Yuran Pendaftaran Kemasukan Kaveat Persendirian & Yuran Pengikraran	RM 304.00
C	23.04.2013 – Carian Tanah – PN (WP) 50866, Lot 168 Seksyen 88, Bandar KL	RM 30.00
	17.10.2012 – Penyeteman Perjanjian Jual Beli	RM 30.00
	19.12.2013 – Carian Rasmi Hakmilik	RM 100.00
	JUMLAH	RM 3,236.00

D

E [56] In cl 2.1 of the SPA, the parties agreed that the SPA shall be ‘conditional upon’ the issue document of title being registered in the name of the first defendant and the first defendant is successful in obtaining the state authority’s consent to sell and transfer the said land to the plaintiff (‘the two conditions precedent’).

[57] Clause 2.1 of the SPA stipulates as follows:

F 2. CONDITION PRECEDENT

2.1 The parties hereto hereby agree that this Agreement shall be conditional upon the Purchaser obtaining the following:

- G**
- (a) The Issue Document of Title in respect of the Property being duly registered under the name of the Vendor; and
 - (b) The Vendor securing the State Authority’s Consent to sell and transfer the said Property in favour of the Purchaser (‘the said Consent’),

H [58] On 16 April 2013, the issue document of title of the said land, vis a *Pajakan Negeri Title* in Malay or a ‘State Lease’ in English, was issued in the name of the first defendant.

I [59] Hence, the first condition precedent in cl 2.1(a) of the SPA was fulfilled by the first defendant.

[60] The *Pajakan Negeri Title* has the following restrictions in interest in Malay:

Tanah ini tidak boleh dipindahmilik, dipajak, dicagar atau digadai tanpa kebenaran

Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur.

A

(See Tab B, Part A, revised common bundle of documents (Vol 1), Bundle B).

[61] In English, the restrictions in interest are that the said land cannot be transferred, leased, pledged or charged without the consent of the Land Committee of the Federal Territory of Kuala Lumpur ('the land committee'), which is the equivalent of the state authority had the said land been situated in one of the fourteen states of Malaysia.

B

[62] However, before the first defendant could secure the land committee's consent to sell and transfer the said land to the plaintiff, which is the second condition precedent to be fulfilled by the first defendant under cl 2.1(b) of the SPA, the plaintiff lodged a private caveat on the title to the said land, on 25 April 2013 vide a Caveat Presentation No 6631/2013.

C

D

[63] At all material times, the first defendant's conveyancing solicitors, completely, failed to object, on behalf of the first defendant, to the lodgement of the private caveat by the plaintiff.

E

[64] Subsequently, on 20 June 2013, the first defendant applied to the Director of Lands and Mines to obtain the land committee's consent to transfer the said land to the plaintiff ('the first application') in order to fulfil the second condition precedent as stipulated in cl 2.1(b) of the SPA.

F

[65] But the first application was rejected by the Director of Lands and Mines vide a letter dated 23 August 2013 on the ground that 'Pindahmilik daripada Bumiputera/Syarikat Bumiputera kepada Bukan Bumiputera/Syarikat Bukan Bumiputera' (see Tab 5, Part B, revised common bundle of documents (Vol 1), Bundle B).

G

[66] In English, the ground for the rejection of the first application is that the consent sought for was for the 'transfer (of the said land) from a Bumiputera ('the first defendant') to a non-Bumiputera company ('the plaintiff')'. What this means is that had the plaintiff been a Bumiputera company, the first application would have been approved by the land committee.

H

[67] In cl 2.2 of the SPA, the parties agreed that in the event that the two conditions precedent could not be complied with by the first defendant within six months from the date of the SPA ('the period of six months'), provided that such non-compliance is not due to the wilfull default and/or omission of the first defendant, the plaintiff may choose either one of two options.

I

- A** [68] One of the two options is to grant to the first defendant such extended time as agreed to by the plaintiff to effect the first defendant's compliance of the two conditions precedent ('the first option').
- B** [69] The other option is to terminate the SPA ('the second option').
- [70] The plaintiff chose the first option. Hence, in accordance with cl 2.2 of the SPA, the plaintiff granted an extension of time to the first defendant to secure the land committee's consent.
- C** [71] Hence, on 6 January 2014, the first defendant submitted an appeal against the rejection of the first application to the Director of Lands and Mines ('the first appeal') (see Tab 7, Part B, revised common bundle of documents (Vol 1), Bundle B).
- D** [72] However, the Director of Lands and Mines rejected the first appeal vide a letter dated 1 April 2014 on the ground that 'Pemilikan kurang daripada 10 tahun bagi tanah berimilik kerajaan' (see Tab, 8, Part B, revised common bundle of documents (Vol 1), Bundle B).
- E** [73] In English, the ground for the rejection of the first appeal is that the first defendant's ownership of the said land being government land alienated to the first defendant is less than ten years.
- F** [74] The plaintiff granted another extension of time to the first defendant to lodge a further appeal to the Director of Lands and Mines.
- [75] Hence, on 3 November 2014, the first defendant lodged a further appeal to the Director of Lands and Mines ('the second appeal'). However, the plaintiff was not informed by the first defendant of the outcome of the second appeal.
- G**
- H** [76] Subsequently, on 15 February 2016, which is a good one year and three months after the first defendant lodged the second appeal, the plaintiff received from the second defendant a copy each of Form E and Form F, both dated 27 January 2016, together with a copy of the notification of investigation to the plaintiff.
- I** [77] Form E is the proposed acquisition of a portion of the said land. The proposed acquisition of a portion of the said land is for the project for the construction of a multi-tiered junction at the Jalan Ampang/Jalan Jelatek Junction, Kuala Lumpur. Form F is the notification requiring written explanation.

[78] The two forms were issued in accordance with the Land Acquisition Act 1960 to the first defendant, as the registered owner of the said land, and the first defendant was notified to attend the hearing of the investigation by the second defendant. A

[79] The copy of the notification of investigation was issued to the plaintiff, as the caveator over the title of the said land, to attend the hearing of the investigation by the second defendant. B

[80] The notification of investigation fixed the hearing date for the investigations of all claims for compensation of all interests over the said land on 23 February 2016 (see Tab 26 to Tab 28, Part B of the revised common bundle of documents (Vol 1), Bundle B). C

[81] However, the plaintiff was not served by the first defendant with any such written notice or *gazette* of the acquisition of a portion of the said land. D

[82] Hence, by a letter dated 16 March 2016, the plaintiff's solicitors notified the first defendant's solicitors of the land acquisition, the rights of the plaintiff and the obligations of the first defendant under cl 15.01 of the SPA and the plaintiff's solicitors reserved the plaintiff's rights under cl 15.01(b) of the SPA (see pp 2–4, Tab 29 and p 10, Tab 1, Part B of the revised common bundle of documents (Vol 1), Bundle B). E

[83] In cl 15.01(b) of the SPA, the parties have agreed that if the plaintiff elects to complete the purchase of the said land notwithstanding the acquisition of any part thereof within the completion date or extended completion date (as the case maybe), the first defendant shall, immediately, notify the relevant acquiring authority of the plaintiff's interest in the said land and the compensation shall belong to and be paid to the plaintiff subject to full payment of the balance purchase price by the plaintiff. F
G

[84] By a letter dated 21 March 2016, the first defendant's solicitors notified the plaintiff's solicitors that the first defendant did not receive any notice of the acquisition of a portion of the said land from the second defendant. H

[85] In the same letter, the first defendant's solicitors also notified the plaintiff's solicitors that the first defendant has no knowledge regarding the land acquisition and the first defendant requested for a copy of the notice of the land acquisition for a portion of the said land from the plaintiff's solicitors. I

[86] The first defendant takes the stand that he has no knowledge of the issue of Form E and Form F, both dated 27 January 2016 and the 'Pembetulan

- A** Siasatan' under the Land Acquisition Act 1960 until a copy of each of the three documents were served on the first defendant's solicitors on 23 March 2016 by the plaintiff's solicitors.
- B** [87] The plaintiff takes the stand that Form E and Form F together with the 'Pemberitahuan Siasatan' issued under the Land Acquisition Act 1960 were duly served by the second defendant on the first defendant at the first defendant's known address.
- C** [88] On 23 March 2016, the first defendant's solicitors received from the plaintiff's solicitors a copy each of Form E and Form F and a copy of the 'Notification of Investigation' issued under the Land Acquisition Act 1960 for the land acquisition of a portion of the said land, which were sent to them by the plaintiff's solicitors on the same date.
- D** [89] Subsequently, by a letter dated 18 May 2016 issued by the first defendant's solicitors to the plaintiff's solicitors, the first defendant terminated the SPA ('the letter of termination').
- E** [90] In the letter of termination, the first defendant relied only on one ground for the termination of the SPA.
- F** [91] The one ground is that the plaintiff had, wrongfully, in breach of cl 16.01 of the SPA, caused a private caveat to be entered on the title of the said land.
- [92] Subsequent to the filing of this suit by the plaintiff, the hearing for the acquisition of a portion of the said land was held before the second defendant.
- G** [93] After the hearing, on 12 January 2017, the second defendant awarded to the first defendant as the registered owner of the said land compensation of a sum of RM500,000 for the acquisition of 125/sm out of 862sm of the said land; compensation of a sum of RM737,000 for injurious affection; and
- H** compensation of a sum of RM50,191.78 for early entry onto the acquired portion of the said land. The second defendant did not award any compensation to the plaintiff.
- I** [94] Hence, the total amount of the compensation awarded for the acquisition of a small portion of the said land, vis 14.50% of the said land, by the second defendant is a sum of RM1,287,191.78 whereas the purchase price of the whole of the said land, vis 100% of the said land is a sum of RM1,855,714 (see Tab 47 and Tab 49, Part B, revised common bundle of documents (Vol 2), Bundle B).

[95] The plaintiff has applied to the Kuala Lumpur High Court vide Kuala Lumpur High Court Originating Summons No WA-15-11-03 of 2017 ('the 11/2017 OS') for its determination as to which party, vis the plaintiff or the first defendant, is entitled under the SPA to the compensation awarded by the second defendant and the Kuala Lumpur High Court NCVC 1, which is hearing the plaintiff's application in the 11/2017 OS, is awaiting the decision of this court, vis Kuala Lumpur High Court NCVC 11, in this case.

[96] By the consent of the parties in the 11/2017 OS, the compensation awarded, although in the name of the first defendant as the landowner, was deposited into the Kuala Lumpur High Court NCVC 1 pending the disposal of this suit by this court.

THE PLAINTIFF'S SUBMISSIONS

[97] The plaintiff submitted through Mr Scott, the plaintiff's learned counsel, that the plaintiff's claim ought to be allowed based on, inter alia, the following reasons:

- (a) the termination of the SPA by the first defendant, purportedly, under cl 4.01 of the SPA is wrongful as the first defendant was aware of the breach of cl 16.01 of the SPA for a period of three years but did not terminate the SPA and only terminated it after being made aware of the compensation that the second defendant would pay to the landowner for the acquisition of a portion of the said land;
- (b) upon being notified by the second defendant of the acquisition of a portion of the said land, it is the first defendant's contractual duty under cl 15.01(b) of the SPA to notify the second defendant of the plaintiff's interest in the said land;
- (c) despite the acquisition of a portion of the said land, the plaintiff has elected to continue with the completion of the SPA;
- (d) the first defendant can fulfil the second condition precedent within the extended time given by the plaintiff to the first defendant; and
- (e) therefore, the termination of the SPA by the first defendant, purportedly, under cl 4.01 of the SPA is mala fide and unlawful.

THE FIRST DEFENDANT'S SUBMISSIONS

[98] The first defendant submitted through Mr Lim that the plaintiff's claim ought to be dismissed based on the following reasons:

- (a) the first defendant neither had knowledge of the private caveat entered on the title of the said land upon the application of the plaintiff nor did he instruct his conveyancing solicitors to write to the plaintiff's

- A conveyancing solicitors to obtain the caveator's consent for the application by the first defendant for the state authority's consent to sell and transfer the said land to the plaintiff;
- B (b) hence, upon learning, albeit some three years later, that the plaintiff has breached cl 16.01 of the SPA, by causing the private caveat to be entered on the title of the said land, the defendant is entitled to terminate the SPA and forfeit a sum of RM185,571.40, being 10% of the purchase price, from the earnest deposit, as the agreed liquidated damages under cl 4.01 of the SPA;
- C (c) the SPA is frustrated as it is incapable of performance due to the repeated failures by the first defendant to secure the land committee's consent to sell and transfer the said land to the plaintiff; and
- D (d) the SPA has also become void as it is impossible for the first defendant to fulfil the second condition precedent due to the ground given by the Director of Lands and Mines for the rejection of the second appeal.

Issue (1): Whether the plaintiff has a caveatable interest in the said land?

- E [99] I answered issue (1) in the affirmative in favour of the plaintiff.
- F [100] The plaintiff has paid the earnest deposit to the first defendant prior to the execution of the SPA and subsequent thereto, the plaintiff has executed the SPA with the first defendant (see cl 3.02, p 4, Tab 1, Part B, revised common bundle of documents (Vol 1), Bundle B).
- G [101] Prior to the execution of the SPA, the plaintiff has also paid in full the premium of RM485,614 for the said land, which was intended to be borne equally by the parties pursuant to cl 3.04 of the SPA (see p 4, Tab 1, Part B, revised common bundle of documents (Vol 1), Bundle B).
- H [102] Clause 3.04 of the SPA stipulates as follows:
Clause 3.04:
The parties hereto agree that all the payments due and payable under Borang 5A (Sections 81 & 82) of the National Land Code (a copy annexed herewith as Second Schedule) in respect of the Property (hereinafter referred to as 'the Premiums') shall be borne by them equally.
- I [103] After the execution of the SPA, the plaintiff has also paid the additional premium of RM31,577.50 for the alienation of the said land even though the plaintiff is not contractually obliged to do so under the SPA (see Q&A No 3, at p 2, of encl 55, exh P2, and Schedule II on p 19, Tab 1, Part B revised common bundle of documents (Vol 1), Bundle B).

[104] The plaintiff has paid a total sum of RM764,732 towards the purchase of the said land under the SPA, which the first defendant has agreed to sell to the plaintiff at the purchase price of RM1,855,714 (see cl 3.01, p 4, Tab 1, Part B, revised common bundle of documents (Vol 1), Bundle B). A

[105] The plaintiff is also able and willing to complete the SPA upon the first defendant fulfilling the second condition precedent under cl 2.1(b) of the SPA. Based on these facts, I am of the view that the plaintiff has a beneficial interest in the said land and also a pre-registration contractual right to the said land that arises from the SPA. B

[106] Section 323(1)(a) and (1)(b) of the National Land Code ('the NLC 1965') recognises that unregistrable interests in land need protection pending their registration. C

[107] The section allows any person or body claiming, inter alia, any registrable interest in any alienated land or any right to such interest to apply to enter a private caveat on the title to the land. D

[108] The section states as follows: E

323 Applications for entry of private caveats

(1) The persons and bodies at whose instance a private caveat may be entered are —

(a) *any person or body claiming title to, or any registrable interest in, any alienated land [or undivided share in any alienated land] or any right to such title or interest;* F

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) ... (Emphasis added.) G

[109] A caveat is a protective creature that is devised by a Torrens statute for the protection of a pre-registration contractual right that arises from a contract of land transaction in Torrens system land or, as the case may be, a pre-registration unregistered registrable interest that arises behind an unregistered but registrable instrument of dealing in Torrens system land (see *The Torrens System and Equitable Principles* by SY Kok, 2012 (Sweet & Maxwell Asia)). H

[110] An entry of a caveat on the Torrens register will forbid the Registrar of Titles from registering any instrument of dealing that will defeat the caveator's caveatable claim (see *Windeyer J, J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546). In that case, at p 558, Windeyer J stated as I

A follows:

... the primary purpose of a caveat against dealings is not to give notice to the world of an interest. It is to warn the Registrar-General of a claim. The word caveat has long been used in law to describe a notice given to an official not to take some step without giving the caveator an opportunity to oppose it. According to the *Oxford English Dictionary* that sense of the word goes back to 1654. If a person intending to deal with a registered proprietor becomes aware of a caveat, it is notice to him of a claim that an interest is outstanding; and then: *caveat emptor; qui ignorare non debuit quod jus alienum emit*. But a caveat is not the only way in which a purchaser from the registered proprietor can be made aware of the prior equitable claims of another person. It is merely one way, and no doubt a very sure way, in which such a claimant may protect his interest against its subversion by the registered proprietor in favour of another person.

D [111] Another and an equally important aspect of a Torrens caveat is to accord statutory protection to the vulnerable pre-registration right or unregistered registrable interest until the caveator has reached the final stage of registration. This is achieved by stating that the effect of a caveat is to prevent a proprietor concerned from dealing inconsistently with the subject land to the detriment of the caveatable claim (see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1977] AC 302 (PC)). In that case, at p 46 (MLJ); p 308A-F/46I (left-hand column)-46E (right-hand column) (AC), Lord Diplock stated as follows:

F Where the application is for a private caveat expressed to bind the land itself and not a particular interest in the land only, it is provided by s 322(2) that the effect of the caveat shall be:

- ... to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of —
- G (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
- (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
- H (c) any lien-holder's caveat in respect thereof.

Where a private caveat is expressed to bind a particular interest only the corresponding prohibition relates to that registered interest only.

I The registrar is required by s 324(1) to endorse the register document of title to the land to which the caveat relates with the words 'Private Caveat' as soon as may be after the application is received. The caveat takes effect, however, from the time the application is received at the registry and the prohibition applies to the registration, endorsement or entry of instruments, claims to exempt tenancies or lien-holders' caveats received at the registry after that time.

The purposes of a private caveat is to preserve the status quo pending the taking of

timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts. If the person whose land or interest is bound by the caveat applies to the registrar for its removal, the registrar must remove it at the expiry of a month unless the court upon the application of the caveator orders otherwise. Any person aggrieved by a private caveat may apply to the court at any time for an order for its removal. The registrar's functions in relation to the entry and removal of private caveats are ministerial only. He is not concerned to enquire into the validity of the claim on which an application for a private caveat is based; and a person who secures the entry of a private caveat without reasonable cause is liable to compensate anyone who suffers loss or damage as a result of such entry.

[112] The noting of a caveat on the face of the Torrens register is, at the very least, to preserve the status quo pending the taking of timeous steps by an applicant (caveator) to enforce his other yet to be established claim against the subject land (see the leading cases on the use of the Torrens caveats vis *Oertel v Hordern* (1902) 2 SR (NSW) Eq 37; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1977] AC 302, (PC); *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; [1980] AC 331 (PC); *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b at p 269; [1980] AC 497 at p 503 (PC); *Wong Kok Chin v Mah Ten Kui Joseph* [1992] 2 SLR 161 at pp 163I–164C (CA); and *TSM Development Pte Ltd v Leonard Stephanie Celine nee Pereira* [2005] 4 SLR 721 at paras 43–44 (CA); referred to in footnote 146–footnote 147, footnote 157, footnote 182 and footnote 185 in *The Torrens System and Equitable Principles* by SY Kok, 2012 (Sweet & Maxwell Asia), including the proper interpretation on the statutory protection that is offered by a Torrens caveat for pre-registration vulnerable rights or unregistered interests in Torrens system land by Chan Sek Keong CJ in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] SGCA 30 at para 96; [2006] 4 SLR 884 at para 96 (CA)).

[113] Therefore, in my view, as the plaintiff has a caveatable interest in the said land, it may lodge a private caveat on the title to the said land to protect its right to the unregistered registrable interest in the said land while the sale and purchase transaction is pending completion.

[114] On 14 June 2016, the company secretary of the plaintiff was served with a copy of Form 19C under s 326 of the NLC 1965. It is a notice of intended removal of caveat dated 7 June 2016 filed by the first defendant and issued by the Registrar of Titles State/District of Wilayah Persekutuan Kuala Lumpur ('the Registrar of Titles'), whereby upon the lapse of a period of two months from the date of service of the said notice, the Registrar of Titles shall remove the private caveat lodged on the title of the said land vide Caveat Presentation No 6631/2013 save as ordered by the court.

[115] Simultaneous with the writ and statement of claim herein, the plaintiff filed an application at the Kuala Lumpur High Court vide an

A originating summons, to challenge the issuance of the Form 19C as well as to apply for an extension of time under s 326(2) of the NLC 1965.

[116] An order extending the private caveat was granted on 13 July 2016 by the learned judge of the Kuala Lumpur High Court NCVC 7 ('the said order').

B [117] However, upon the application of the first defendant, the said order was, subsequently, set aside by the learned judge.

C [118] The learned judge was of the view that there is no need for him to assess the merits of the plaintiff's originating summons on the following grounds:

(a) the land acquisition has taken place;

D (b) the title of the said land will have to be surrendered (to the Registrar of Titles); and

(c) as a result, the private caveat falls.

E [119] I am respectfully in agreement with the learned judge's view based on the reasons given by the learned judge.

F [120] As a result of the acquisition of 14.50% of the said land, a new title will be registered by the Registrar of Titles for the balance 85.50% (100% – 14.50% = 85.50%) of the said land ('the remainder of the said land') and an issue document of title will be issued by the Registrar of Titles in the name of the first defendant, being the owner of the remainder of the said land.

G [121] Therefore, in my view, the plaintiff may apply, under s 323(1)(a) of the NLC 1965, to lodge a private caveat on the new registered title of the remainder of the said land to protect the plaintiff's pre-registration contractual right to the remainder of the said land that arises from the SPA pending the completion of the SPA.

H *Issue (2): Whether the SPA has been varied in accordance with cl 20.04 of the SPA when by an exchange of letters dated 19 June 2013, the first defendant's solicitors requested to be supplied by the plaintiff's solicitors with the caveator's consent?*

[122] I answered issue (2) in the affirmative in favour of the plaintiff.

I [123] By a letter dated 19 June 2013, the first defendant's conveyancing solicitors wrote to the plaintiff's conveyancing solicitors stating as follows:

Please take note that we are unable to submit the consent to transfer and charge as there is a Caveat lodged by your clients. Kindly obtain the Caveator's Consent

addressed to the Pendaftar Hakmilik or to execute the Withdrawal of Caveat ...

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(See Q&A No 4, at p 3, encl 55), exh P2, and Tab 3, Part B, revised common bundle of documents (Vol 1), Bundle B).

[124] By a letter of the same date, the plaintiff's conveyancing solicitors rendered the caveator's consent as requested by the first defendant's conveyancing solicitors (see Q&A No 4, at p 3, encl 55), exh P2, and pp 1–2, Tab 4, Part B, revised common bundle of documents (Vol 1) Bundle B).

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[125] In my judgment, if the first defendant had, genuinely, wanted to terminate the SPA based on the breach of cl 16.01 of the SPA by the plaintiff in lodging the private caveat on the title of the said land before the first defendant had secured the land committee's consent for the transfer of the said land to the plaintiff, he ought to have acted, immediately (see the word 'forthwith' used in cl 4.01 of the SPA), either by himself or through his conveyancing solicitors to terminate the SPA, by notifying the plaintiff, to this effect instead of asking the plaintiff, as the caveator, to give its consent, through the plaintiff's solicitors, to enable the presentation by the first defendant of the application for consent to transfer and to charge to the land committee.

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[126] In not taking that immediate action and in requesting to be supplied by the plaintiff's conveyancing solicitors with the caveator's consent to enable the presentation by the first defendant of the application for consent to transfer and to charge to the land committee, the first defendant has, in my view, varied cl 16.01 of the SPA in accordance with cl 20.04 of the SPA or waived the strict compliance of that clause and can no longer insist on the strict compliance of that clause.

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[127] In the trial, the first defendant did not deny that Messrs KS Lam & Co had acted as his conveyancing solicitors at the material time.

[128] However, the first defendant attempted to blame his conveyancing solicitors for acting without his authorisation on this matter. But to my mind, this is a bare allegation based on two reasons. Firstly, he did not put his conveyancing solicitors on notice that he will make a claim against them for acting without authority. Secondly, he has chosen not to bring third party proceedings against his conveyancing solicitors for an indemnity in the event the court finds him liable to the plaintiff at the conclusion of the trial.

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[129] Therefore, any knowledge of the first defendant's conveyancing solicitors of the lodgement of a private caveat by the plaintiff on the title of the said land is imputed as knowledge of the first defendant being the client of

A Messrs KS Lam & Co, at the material time.

Issue (3): Whether the termination of the SPA by the first defendant vide a letter dated 18 May 2016 on the ground of the lodgement of a private caveat by the plaintiff on the title of the said land was mala fide and unlawful?

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[130] I answered issue (3) in the affirmative in favour of the plaintiff.

[131] Issue (3) is also the first issue in the first defendant's five re-re-revised issues for the determination of the court.

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[132] After a lapse of almost three years and upon being notified of the acquisition of a portion of the said land by the government through the second defendant and knowing fully well that there would be compensation payable for the acquisition of a portion of the said land, the first defendant terminated the SPA pursuant to cl 4.0 of the SPA, purportedly, due to the plaintiff's breach of cl 16.01 of the SPA, vis solely, on the ground of the lodgement by the plaintiff of a private caveat on the title of the said land.

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E [133] The letter of termination states as follows:

18th May 2016

Messrs David Gurupatham And Koay

Advocates & Solicitors

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Unit 3-11, Block F, Pusat Perdagangan Phileo 1

No 9, Jalan 16/11, Off Jalan Damansara

46350 Petaling Jaya, Selangor Darul Ehsan

G

And

Messrs Sault Scott & Co

Advocates & Solicitors

No 7-3, Jalan PJU 5/10

H

Dataran Sunway, Kota Damansara

47810 Petaling Jaya, Selangor Darul Ehsan

Dear Sirs,

I

Re: Termination of Sale and Purchase Agreement dated 9.10.2012 ('SPA')

Vendor: Amiruddin bin Abdul Rahman

Purchaser: Asal Anggun Development Sdn. Bhd.

Property: Lot 168, Jalan Jelatek, Seksyen 88 Bandar Kuala Lumpur measuring

approximately 9,278.57 square feet in area

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We refer to the above matter.

2. We have been informed by our client and subsequently confirmed by a land search conducted that your client has entered a private caveat against the Property. In doing so, your client has breached the terms and conditions of Clause 16.01 of the SPA, i.e. wrongfully entering the said caveat prior to our client securing the consent from the land authority to transfer the Property to your client.

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3. By reason of the aforesaid breach, our client hereby terminates the SPA forthwith pursuant to Clause 4.01 of the SPA.

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4. In consequence of such termination, our client shall be entitled to forfeit the sum of RM 185,571.40 as agreed liquidated damages from the earnest deposit of RM 243,293.50 paid by your client. Our client shall refund to your client the balance thereof and all monies paid by your client towards account of the purchase price (if any), free of interest.

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5. Accordingly, your client shall return all documents forwarded by or on the instructions of our client (including the original Premium receipt) with our client's interests therein intact and withdraw the private caveat and all other encumbrances attributable to your client within 7 days from the date thereof, failing which our client shall take all necessary action to remove the same, in which event your client shall be liable for damages, costs and expenses incurred thereon.

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Yours faithfully,

...(signed)...

MESSRS EDWIN LIM & SUREN

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c.c. Client (Emphasis added.)

[134] In cl 16.01 of the SPA, the parties agreed that upon the first defendant securing the consent from the state authority (and not prior to the first defendant securing the consent from the state authority) to transfer the said land to the plaintiff, the plaintiff shall be entitled at its own cost and expense, at any time thereafter, to enter a private caveat against any dealing with the said land until the presentation of the Transfer in favour of the plaintiff.

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[135] Clause 16.01 of the SPA stipulates as follows:

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16.01 Upon the Vendor securing the consent from the Authorities to transfer the Property to the Purchaser, the Purchaser shall be entitled at their own cost and expense at any time thereafter to enter a private caveat against any dealing with the Property until the presentation of the Transfer in favour of the Purchaser PROVIDED ALWAYS that in the event of early termination of this Agreement pursuant to the terms of this Agreement or for the purpose of effecting the registration of the Transfer, the Purchaser shall at their own cost and expense withdraw the aforesaid private caveat and to ensure that the same is done, the Purchaser shall prior to presentation of the private caveat at the land office deposit

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A two (2) copies of the withdrawal of caveat forms duly executed together with the registration fees with the Purchaser's Solicitors who are hereby irrevocably authorized to present the same for registration upon lawful/termination of this Agreement pursuant to the terms herein.

B [136] However, the plaintiff had caused the private caveat to be entered on the title of the said land prior to the first defendant securing the land committee's consent to transfer the said land to the plaintiff.

C [137] Nevertheless, as stated earlier, at all material times, neither the first defendant nor the first defendant's conveyancing solicitors had objected to the lodgement of a private caveat by the plaintiff on the title of the said land.

D [138] It is noteworthy that in terminating the SPA, the first defendant failed to return the earnest deposit and the other payments made by the plaintiff on account of the first defendant as set out above but instead, purportedly, exercised his right to forfeit the agreed sum of RM185,571.40 as stipulated in cl 4.01 in the event of a breach of contract by the plaintiff.

E [139] Clause 4.01 of the SPA stipulates as follows:

F *4.01 In the event the Purchaser shall fail to comply with any term and condition of this Agreement or default in the payment of the Balance Sum aforesaid by the Completion Date or the Extended Completion Date herein (as the case may be) for reasons not attributable to the fault or default of the Vendor, the Vendor shall be entitled to terminate this Agreement forthwith by a written notice to the Purchaser (sic) Solicitors whereupon the Vendor shall be entitled to forfeit the Sum of Ringgit Malaysia One Hundred Eighty Five Thousand Five Hundred Seventy One and Cents Only (RM185,571.40) only as agreed liquidated damages for breach of contract by the Purchaser subject for (sic) the Vendor refunding or causing the refund of all other monies,*

G *if any, paid by the Purchaser towards account of the Purchase Price and the amount of Ringgit Malaysia Two Hundred Forty Three Thousand Two Hundred Ninety Three and Cents Fifty (RM 243,293.50) being the advance premium paid by the Purchaser on behalf of the Vendor herein including any monies held by the Vendor's Solicitors (if any) as stakeholder, free from interest, to the Purchaser. In exchange of (sic) the return of all documents forwarded by or on the instruction of the Vendor (including the original Premium receipt) with the Vendor (sic) interests therein intact and the removal of all encumbrances attributable to the Purchaser or the Purchaser (sic) Financier and redeliver vacant possessions (sic) of the Property and upon fulfillment of the aforesaid events, this Agreement shall become null and void and of no further effect and thereafter neither party shall have any rights whatsoever against the other.*

I (Emphasis added.)

[140] In the circumstances, in my judgment, the termination of the SPA by the first defendant vide a letter dated 18 May 2016 on the sole ground of the lodgement of a private caveat by the plaintiff on the title to the said land was

mala fide and unlawful as the first defendant had varied cl 16.01 by the exchange of the letters from the parties', respective, solicitors, and/or by conduct waived his rights by keeping quiet for almost three years and is, therefore, estopped from insisting on the strict compliance by the plaintiff of cl 16.01 and, consequently, from relying on cl 4.0 to terminate the SPA.

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[141] In deciding issue (3) in the affirmative in favour of the plaintiff, I also took into consideration the following agreed, undisputed and proven facts:

- (a) the plaintiff has paid the earnest deposit, the premium, the additional premium and all the expenses for the alienation of the said land to the first defendant, totaling a sum of RM764,732, which is more than 1/3 of the purchase price of the said land, vis $RM1,855,714 \div 3 = RM618,571.33$;
- (b) the first defendant has paid nothing towards the expenses for the said land even though under cl 3.04 of the SPA, the parties have agreed that the expenses shall be borne equally by them;
- (c) the first defendant never gave any notice of his intention to terminate the SPA, prior to being informed of the land acquisition of a portion of the said land and knowing fully well that there will be compensation paid out to the owner of the said land;
- (d) that time is no longer an issue between the parties;
- (e) this is because the issue concerning the plaintiff's contractual right under cl 2.2 of the SPA to extend the six months' period as stipulated therein by granting an extension of time to the first defendant to secure the land committee's consent to transfer the title of the said land to the plaintiff had been raised and decided by Yeoh Wee Siam J in a civil suit, which was instituted by the plaintiff against the first defendant, in November 2104 in the Kuala Lumpur High Court vide Kuala Lumpur High Court Civil Suit No 22NCVC-516-11 of 2014 ('the previous suit');
- (f) in the previous suit, the plaintiff had sought for, inter alia, an order to compel the first defendant to obtain the land committee's consent for the sale and transfer of the said land to the plaintiff (see pp 1 to 9, Tab 11, Part B, revised common bundle of documents (Vol 1) Bundle B);
- (g) the decision in the previous suit on the issue of extension of time was eventually delivered on 12 January 2017 in favour of the plaintiff;
- (h) however, on the application of the first defendant, the previous suit was struck out (see pp 1 & 2, Tab 19, Part B, revised common bundle of documents (Vol 1) Bundle B) for being premature as an appeal was lodged by the first defendant on 03 November 2014 and it was pending at that time (see para 8, p 3 and p 27, Tab 13, and p 6, Tab 18, Part B, revised common bundle of documents (Vol 1) Bundle B);

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- A (i) nevertheless, in my view, the issue concerning the plaintiff's contractual right under cl 2.2 of the SPA to extend the six months' period as stipulated therein by granting an extension of time to the first defendant is *res judicata* and cannot be relitigated in this action; and
- B (j) the first defendant has also admitted in his own affidavit (see paras 6–7, p 3 and sub-para (iii), pp 10–11, Tab 17, Part B, revised common bundle of documents (Vol 1) Bundle B) and given evidence in the full trial that time is no more an issue between the parties (see Q&A No 6, pp 4–5 of encl 55) exh P2).

C [142] Therefore, I agreed with Mr Scott that the first defendant cannot use the rejection of the first defendant's application for consent to transfer the said land to the plaintiff and/or appeals as a ground for the termination the SPA when this ground was not stated in the first defendant's letter of termination dated 18 May 2016.

D [143] Neither can the first defendant use the excuse of the entry of the plaintiff's private caveat to terminate the SPA as he did when he had or ought to have full knowledge of the written variation to the SPA by the exchange of letters dated 19 June 2013 between the conveyancing solicitors for both parties.

E *Issue (4): Whether the plaintiff as the purchaser has the right under cl 2.2 of the SPA to grant to the first defendant such extended time as to enable the first defendant to secure the land committee's consent to sell and transfer the said land to the plaintiff?*

F [144] I answered issue (4) in the affirmative in favour of the plaintiff.

G [145] Clause 2.2 of the SPA stipulates as follows:

H *In the event that Clause 2.1(a) and 2.1(b) (collectively as 'the Conditions') cannot be complied with within six (6) months from the date of this Agreement, and PROVIDED the same is not due to the wilfull default and/or omission of the Vendor, the Purchaser may grant to the Vendor such extended time as agreed to by the Purchaser to effect compliance of the Conditions or may elect to terminate this Agreement.* Upon the expiry of the agreed extension of time, this Agreement shall determine and thereafter the Vendor shall forthwith refund the Purchaser all monies paid by the Purchaser towards account of the Purchase Price and the amount of Ringgit Malaysia Two Hundred Ninety-Three and Cents Fifty (RM 234,293.00) being the advance premium paid by the Purchaser on behalf of the Vendor. (Emphasis added.)

I [146] In my judgment, based on the wording used by the parties in cl 2.2 of the SPA, it is the intention of the parties that if the first defendant's non-fulfilment of cl 2.1(b) of the SPA is not due to the wilful default and/or omission of the first defendant as the vendor, the plaintiff as the purchaser may

grant to the first defendant as the vendor such extended time as agreed to by the plaintiff as the purchaser to effect compliance of the two conditions precedent or the plaintiff as the purchaser may elect to terminate this agreement.

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[147] Further, since the plaintiff chose the first option and did not choose the second option, vis the plaintiff did not elect to terminate the SPA, the plaintiff, clearly, has the contractual right under cl 2.2 of the SPA to grant to the first defendant such extended time as agreed to, solely, by the plaintiff for the purpose of enabling the first defendant to secure the land committee's consent to sell and transfer the said land to the plaintiff.

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[148] In my view, due to the clear wording used by the parties in cl 2.2 of the SPA, it was the intention of the parties that time was not the essence of the contract and that the plaintiff was to be the sole decision maker in regard to the time for the completion of the SPA, in the event the two conditions precedent could not be fulfilled by the first defendant through no willful default and/or omission of the first defendant.

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[149] In *Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559, High Court (Kuala Lumpur), Anuar J held as follows on when will time be of the essence of a contract:

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The general principles as to time being of the essence of a contract have been summarised in the judgment of Mohamed Azmi J (as he then was) in *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [at p 21]:

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On the first issue, the general principles as to time being [of] the essence of the contract have been dealt with by Gill J (as he then was) in the case of *Tan Ah Kian v Haji Hassan* [1962] MLJ 400, a decision approved and affirmed by the *Federal Court* ([1963] MLJ 175). The three situations in which His Lordship had considered time to be [of] the essence of the contract are:

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- (i) where the parties have expressly stipulated in the contract that it shall be so;
- (ii) where it was not originally stated to be but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude, and
- (iii) where from the nature of the contract or of its subject matter time must be taken to be of the essence of the agreement.

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Applying these principles, I have the following observations to make:

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- (1) the redemption agreement does not expressly provide that time is of the essence;
- (2) no notice has been given by either party to make time of the essence; and

A (3) the nature of the contract or its subject matter, in this case the redemption of lands that are subject to charges, do not, in my view, make time of the essence.

B On the other hand, reading the agreement as a whole and taking into account the surrounding circumstances and the factual background including the genesis and the objective aim of the transaction (which I am entitled to do in accordance with the decision of the Federal Court in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* 8 at p 247), I am satisfied that the parties did not intend time to be of the essence. The requirement to pay interest, which is to be found in the proviso to cl 5.3 of the redemption agreement, in the event of default is an indicia that time is not of the essence.

C [150] Reverting back to the instant case, it is abundantly clear that the right of granting extensions of time under cl 2.2 of the SPA to the defendant to appeal against the rejection of the application for consent lies, solely, and only with the plaintiff. It is not to be mutually agreed upon as contended by the first defendant.

D [151] I found that this express term was incorporated into the SPA by both parties being duly represented by their own conveyancing solicitors.

E [152] Therefore, I am satisfied that the SPA was made at arm's length.

F [153] In the circumstances, both the plaintiff and the first defendant must be bound by the terms therein, accordingly, save and except a variation to the cl 16.01 of the SPA pursuant to cl 20.04 as dealt with earlier under issue (2).

G *Issue (5): Whether the plaintiff as the purchaser has duly and properly communicated the purchaser's right of election under cl 15.01 of the SPA to the first defendant as the vendor?*

[154] I answered issue (5) in the affirmative in favour of the plaintiff.

H [155] In their letter dated 16 March 2016 notifying the first defendant's solicitors of the land acquisition, the plaintiff's solicitors stated, amongst others, as follows:

I (a) it is mandatory for the first defendant as the vendor upon receipt of the notice of the land acquisition to, immediately, deliver it to the plaintiff as the purchaser and/or the purchaser's solicitors in accordance with cl 15.01 of the SPA, which states as follows:

Clause 15.01

The Vendor hereby warrants and undertakes that he/she/they has/have no notice or knowledge of any intended acquisition of the Property or any part

thereof under or pursuant to the Land Acquisition Act, 1960 by the Government or other relevant authority but *if any other notification in writing or by gazette shall be found to be in existence prior to and up to the Completion date or Extended Completion Date (as the case maybe)*, the Purchaser shall have the right within fourteen (14) days from the date of receipt of such notice from the Vendor (*which notice the Vendor undertakes to deliver to the Purchaser and/or Purchaser's Solicitors immediately upon receipt thereof*) to elect either to complete the purchase of the Property or to terminate this Agreement such election to be made in writing not later than fourteen (14) days from the date of receipt of such notice by the Purchaser. (Emphasis added.)

- (b) that the plaintiff reserves its right under cl 15.01(b) of the SPA to elect to continue and complete the SPA although there is a land acquisition; and
- (c) that the plaintiff's solicitors have attended the hearing of the land acquisition proceeding on 23 February 2016 to represent the plaintiff as the caveator of the title of the said land.

[156] Hence, the plaintiff has established that it has duly and properly communicated the purchaser's right of election under cl 15.01 of the said SPA to the first defendant as the vendor.

Issue (6): Whether the first defendant as the vendor upon being notified of the plaintiff's election to complete the purchase of the said land notwithstanding the acquisition of any portion thereof, has, thereafter, complied with his obligation under cl 15.01(b)?

[157] I answered issue (6) in the negative in favour of the plaintiff.

[158] Clause 15.01(b) of the SPA stipulates as follows:

In the event the Purchaser ... shall elect to complete the purchase of the Property notwithstanding the acquisition of any part thereof within the Completion Date or Extended Completion Date (as the case maybe) and without any reduction to the Purchase Price of the Property, the Vendor shall immediately notify the relevant acquiring authority of the Purchaser's interest in the Property and thereupon the Vendor shall in all matters of this Agreement covering the acquisition act upon and in accordance with the instructions and at the cost of the Purchaser for the purpose of securing the best compensation payable and such compensation shall belong to and be paid to the Purchaser subject to full payment of the Balance Sum herein by the Purchaser. (Emphasis added.)

[159] Having received the election of the plaintiff to complete the purchase of the said land notwithstanding the acquisition of a portion thereof, it was incumbent upon the first defendant to comply with his obligations under cl 15.01(b) of the SPA, which he, completely, ignored and/or failed to comply.

A [160] As at the date of the filing of the writ and statement of claim by the plaintiff, the first defendant has yet to comply with the plaintiff's solicitors' letter dated 16 March 2016, notifying the first defendant, through the first defendant's solicitors, of the plaintiff's election to complete the SPA despite the acquisition of a portion of the said land. These facts are pleaded in paras 17 and **B** 26 of the statement of claim. In the two paragraphs, the plaintiff averred as follows:

C 17. Melalui surat yang bertarikh 16.03.2016 peguam Plaintiff memaklumkan kepada peguam Defendan Pertama antara lain perkara yang dinyatakan di perenggan 14 dan 15 diatas mengekalkan hak Plaintiff di bawah Klause 15.01(b) dalam Perjanjian Jual Beli tersebut, iaitu untuk memilih untuk meneruskan dan melengkapkan Perjanjian Jual Beli tersebut walaupun terdapat pengambilan Hartanah tersebut dan bahawa peguam Plaintiff telah pun menghadiri bicara pada 2302.2016 bagi pihak Plaintiff.

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26. Melalui surat yang bertarikh 23.05.2016 kepada peguam Defendan, peguam Plaintiff telah menekankan hak Plaintiff dibawah Klausa 15.01 dalam Perjanjian Jual Beli tersebut di mana Plaintiff telahpun memilih untuk meneruskan dan melengkapkan Perjanjian Jual Beli tersebut dan memberi notis kepada Defendan **E** Pertama, antara lain, agar memaklumkan pihak berkuasa yang berkenaan mengenai kepentingan Plaintiff ke atas Haratnah tersebut.

F [161] Therefore, in my judgment, based on the parties' contractual bargain as contained in the SPA, the compensation awarded by the second defendant ought, in the circumstances of this case, to be held by the Kuala Lumpur High Court NCVC 1 and released, accordingly, upon receipt of the decision of the Director of Lands and Mines on a new application submitted by the first defendant to the Director of Lands and Mines to secure the land committee's consent to transfer the said land on the tenth year of the first defendant's **G** ownership of the said land, which falls on 15 April 2023, which in the circumstances of this peculiar case is still within a reasonable time, as that date is not too far away from the date of the decision of this court.

H *Issue (7): Whether the lodgement of a private caveat on the title of the said land by the plaintiff amounts to a breach of cl 16.01 of the SPA?*

I [162] I answered issue (7) in the affirmative in favour of the first defendant. This is because based on the clear wording of cl 16.01 of the SPA, the plaintiff may only lodge a private caveat on the title of the said land upon the first defendant obtaining the land committee's consent to sell and transfer the land to the plaintiff but not before the happening of that event.

[163] Issue (7) is the second issue in the first defendant's five re-revised issues for the determination of the court.

[164] However, since cl 16.01 of the SPA was varied in writing pursuant to cl 20.04 of the SPA, the first defendant was not entitled to terminate the SPA under cl 4.01 of the SPA on the ground that the plaintiff breached cl 16.01 of the SPA. A

Issue (8): Whether the SPA is frustrated due to the ground given by the Director of Lands and Mines for the rejection of the second appeal? B

[165] I answered issue (8) in the negative in favour of the plaintiff based on the reasons given for issue (4) above. C

[166] Issue (8) is the third issue in the first defendant's five re-revised issues for the determination of the court.

[167] In my judgment, based on the clear wording used by the parties in cl 2.2 of the SPA, the intention of the parties is that as long as the plaintiff is willing to extend the six months' period stipulated therein to enable the first defendant to fulfill the two conditions precedent of the SPA, the first defendant cannot terminate the SPA on the ground of frustration. D

[168] This is because firstly, there is no option given to the first defendant to terminate the SPA due to the non-fulfilment of the two conditions precedent by the first defendant. E

[169] Secondly, it is the plaintiff, which has paid for the premium in full, the additional premium and all the expenses for the alienation of the said land to the first defendant by the land committee. So the first defendant is contractually obliged to perform his side of the bargain by making appeal after appeal in order to, ultimately, secure the land committee's consent to sell and transfer the said land to the plaintiff or alternatively to wait until the lapse of the ten years period and to submit a new application to secure the land committee's consent to sell and transfer the said land to the plaintiff. F
G

[170] Hence, the first defendant's contention that the SPA is frustrated as the SPA is incapable of performance due to the ground given by the Director of Lands and Mines for the rejection of the second appeal that consent for the sale and transfer of the said land cannot be given because the first defendant's ownership of the said land, which is government land alienated to him, is less than ten years has no merits. H
I

[171] In the case of *Liputan Canggih Sdn Bhd v Sonstar Sdn Bhd* [2016] MLJU 1628 ('the *Liputan's* case'), the Court of Appeal had to decide whether the conditional contract in that case had become void under s 33 of the

A Contracts Act 1950 due the condition not being able to be fulfilled by the defendant.

B [172] In deciding that the conditional contract had become void, the Court of Appeal referred to and applied the principle of law enunciated by the Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ Rep 282 (‘the *National Land Finance Co-operative Society’s* case’).

C [173] In the *National Land Finance Co-operative Society’s* case, the Federal Court held that the contingent event had become impossible upon refusal of approval rendering the contract void in accordance with s 33(a) of the Contracts Act 1950.

D [174] In arriving at its judgment, the Federal Court said as follows at p 211 under ‘Held’ in the headnotes:

E (1) the agreement became void because of the refusal of Foreign Investment Committee to approve the sale over which neither the appellants nor the respondents had control and therefore the various consequential orders made by the learned trial judge were valid;

F (3) Whether it is held that the requirement as to approval is a contingent condition or is a mere promissory condition the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is non-fulfillment of the requirement and in this case also the deposit was refundable as money had and received for the use of the appellants who had paid it.

G And also as follows at p 218:

H It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (see *Trans Trust SPRL v Danubian Trading Co Ltd* — per Denning, LJ — and *Property and Bloodstock Ltd* — per Sachs, LJ). *Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by s 33(a) of the Contracts Act 1950 ...* (Emphasis added.)

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[175] The decision of the Federal Court in the *National Land Finance Co-operative Society's* case was followed by the Court of Appeal in *Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd* [2013] 5 MLJ 677; [2010] 1 LNS 1069. A

[176] Based on what was said by the Federal Court in the *National Land Finance Co-operative Society's* case, I am of the respectful view that the facts of the instant case fall squarely within the words of Salleh Abbas FCJ (later LP) as reproduced above that even though the performance of a conditional contract is suspended until the condition is performed, whereupon the party in breach will be liable to the innocent party, the parties to the conditional contract are not allowed under s 33(a) of the Contracts Act 1950 to resile from it until it could be definitely ascertained that the condition could not be fulfilled. B
C

[177] Having referred to and applied the principle of law enunciated by the Federal Court in the *National Land Finance Co-operative Society's* case, the Court of Appeal in the *Liputan's* case held as follows: D

[56] As shown above, the condition stated in the agreement could not be fulfilled by the defendant due to reasons discussed in the preceding paragraphs. As such, the agreement remained conditional. E

[57] It is trite law that if a contract is a conditional contract for the sale and purchase of the Land, there is no contract of sale and purchase of land to be completed unless and until that condition has been fulfilled.

[58] The law on conditional contract can be gleaned from the following cases: F

1. In *Southwest Minerals (M) Sdn Bhd v Kekal Baru Sdn Bhd* [2014] 1 LNS 1076 the court had discussed the law applicable to conditional contract in a very extensive manner. The court held as follows:

[11] As regards the general principles applicable to a conditional contract, the Privy Council in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 26 MLJ 47; [1959] 1 LNS 3 held that: G

The following general principles are warranted by authority and manifestly reasonable: (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles. H
I

[12] Section 33 of the Contracts Act 1950 provides for the effect of a contingent event becoming impossible, which is that the contract becomes void. It lays down that:

A Enforcement of contracts contingent on an event happening
33(a) *Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.*

B (b) *If the event becomes impossible, such contracts become void.* (Emphasis added.)

C [178] In my respectful view, the facts of the *Liputan's* case are distinguishable from the facts in the instant case. This distinction can be seen in para 62 of the *Liputan's* case, where the Court of Appeal held as follows:

D [62] ... *it is unlikely that the consent of the relevant authority would be obtained* because of the existence of the Registrar's Caveat which was lodged by the state authority on 25 August 2011. The facts pertaining to this caveat were well within the knowledge of the plaintiff at the time of the agreement was executed on 15 September 2011. This was further compounded by the fact that the land was affected by the intended acquisition of the land by the state authority and the notification of which was only known to the defendant vide a letter dated 23 April 2013 from Lembaga Perumahan dan Hartanah Selangor. (Emphasis added.)

E [179] Hence, I agreed with Mr Scott's contention that unlike the *Liputan's* case, where the Court of Appeal held that it was unlikely that the consent of the relevant authority would be obtained, in the instant case, the ground for the rejection of the first defendant's second appeal for consent to transfer was only on the ground of 'Pemilikan kurang daripada 10 tahun bagi tanah bermilik kerajaan'.

G [180] Therefore, I also agreed with Mr Scott's contention that the fact of the vendor/first defendant having to fulfill the condition of ten years ownership before the consent could be granted by the land committee shows that the condition can, definitely, be fulfilled with the effluxion of time as the plaintiff is ready, willing and able to wait for the consent to be approved as testified by PW1.

H [181] Furthermore, as stated earlier, under issue (3), it was stated that in the previous suit instituted by the plaintiff against the first defendant, a further appeal was, allegedly, lodged by the first defendant on 3 November 2014, to the Director of Lands and Mines but to date no reply has been made known to the plaintiff.

I *Issue (9): Whether the completion period of the SPA was extended by the parties?*

[182] I answered issue (9) in the negative in favour of the plaintiff based on the reasons given for issue (4) above.

[183] Issue (9) is the fourth issue in the first defendant's five re-revised issues for the determination of the court. A

[184] Since it is only the plaintiff, which can extend the completion period of the SPA under cl 2.2 of the SPA, the completion period of the SPA was extended not by the parties but by the plaintiff. B

Issue (10): Whether the SPA is deemed terminated after the expiry of the agreed extension of time (if any) pursuant to cl 2.2 of the SPA?

[185] I answered issue (10) in the negative in favour of the plaintiff based on the reasons given for issue (4) and issue (8) above. C

[186] Issue (10) is the fifth issue in the first defendant's five re-revised issues for the determination of the court. D

[187] In my respectful view, the SPA is still valid and subsisting although the performance of the SPA by the transfer of the said land by the first defendant to the plaintiff is suspended as the agreed extension of time given by the plaintiff to the first defendant to effect compliance of the second condition precedent has not expired. E

Issue (11): Whether the plaintiff is entitled to the reliefs prayed for in para 33(a)–(g) of the re-re-amended statement of claim?

[188] I answered issue (11), partly, in the affirmative, vis para 33(a), (b) and (f), in favour of the plaintiff based on the reasons given for issues (1)–(6) and issues (8)–(10) above. F

[189] I did not make any declaratory orders for para 33(c), (d) and (e) even though based on the evidence adduced by the plaintiff's two witnesses (PW1 and PW2) in the full trial, which was not rebutted by the evidence of the first defendant's sole witness (DW1) I found that the plaintiff has proved on the balance of probabilities the facts averred to in the three sub-paras of para 33. G

[190] This is because these are findings of fact based on the evidence before the court and are unsuitable to be pronounced as declaratory orders by the court. H

[191] Issue (11) is the seventh issue in the plaintiff's seven re-revised issues for the determination of the court. I

[192] In cl 5.01 of the SPA, the parties agreed that in the event that the vendor shall willfully fail to complete this transaction for any reason

A whatsoever not attributable to the default of the purchaser of the terms and conditions of this agreement, the purchaser shall be entitled to the remedy of specific performance.

B [193] Clause 5.01 of the SPA stipulates as follows:

Clause 5.01

C *In the event the Vendor shall willfully fail to complete this transaction for any reason whatsoever not attributable to the default of the Purchaser of the terms and conditions of this Agreement, the Purchaser shall be entitled to the remedy of specific performance ...* (Emphasis added.)

D [194] In cl 19 of the SPA, the parties agreed that provided the purchaser himself, vis the plaintiff is not in breach, the purchaser shall be entitled at his/her own discretion to commence an action for specific performance against the vendor to complete the sale and purchase of the said land in accordance with the provisions of the SPA and for damages for the vendor's breach of the SPA.

[195] Clause 19 of the SPA stipulates as follows:

E Notwithstanding anything to the contrary and *provided the Purchaser itself is not in breach*, it is hereby declared that *the Purchaser shall at his / her own discretion entitle to commence action by way of specific performance against the Vendor to complete the sale and purchase in accordance with the Provisions of this sale and purchase agreement and for damages for the Vendor's breach of this sale and purchase agreement.* (Emphasis added.)

F

G [196] In my view, even though the court cannot grant an order of specific performance to compel the first defendant to transfer the said land to the plaintiff upon the plaintiff paying the balance purchase price to the first defendant as the SPA is a conditional contract and the second condition precedent has not yet been fulfilled by the first defendant, the court ought to grant to the plaintiff the reliefs sought as prayed in para 33(a), (b) and (f) of the plaintiff's re-amended statement of claim as the plaintiff is ready, willing and able to continue and complete the transaction of the sale and purchase of the said land.

H

I [197] Hence, in my view, the first defendant is entitled to an order of specific performance to compel the first defendant to perform its contractual obligation to the plaintiff as agreed between them in cl 2.2 of the SPA to secure the land committee's consent for the transfer of the said land to the plaintiff by complying with the plaintiff's direction given pursuant to cl 2.2 of the SPA to make as many appeals as are needed against the refusal of the relevant authority to give consent for the transfer of the piece of land to the plaintiff until the first defendant obtains the consent or alternatively, to wait until the period of ten

years has lapsed or expired before making a new application to the Director of Lands and Mines to obtain the consent of the land committee for the transfer of the piece of land to the plaintiff.

CONCLUSION

[198] In the premises, the court allowed the plaintiff's claim in prayers (a) and (b) of the plaintiff's re-re-amended writ, encl 66, which correspond with prayers (a) and (b) of para 33 of the plaintiff's re-re-amended statement of claim, encl 67, with costs of RM30,000.

Plaintiff's claim allowed in parts with costs of RM30,000

Reported by Izzat Fauzan

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