Antara Vista Sdn Bhd
v
Rumaya Properties Sdn Bhd

Court of Appeal – Appeal No. B-02(NCvC)(W)-13-01/2015
Abang Iskandar Abang Hashim, Badariah Sahamid and Zaleha Yusof JJCA

December 15, 2017

Contract *– Breach – Sale and purchase agreement – Sale and purchase of medium cost apartments between plaintiff and second defendant ("principle agreements") – Land upon which project carried out sold and transferred by second defendant to first defendant without knowledge of plaintiff – Project abandoned and converted from medium cost to high-end project – Whether principle agreements a sham or genuine agreements – Whether transaction between first and second defendants null and void for contravention of s 8 of the Housing Development (Control and Licensing) Act 1966 – Whether specific performance of principle agreements in the circumstances, not an appropriate remedy – Whether monetary compensation as damages in lieu of specific performance, the more appropriate remedy – Housing Development (Control and Licensing) Act 1966, s 8 – Specific Relief Act 1950, s 21(2)(b)*

The appellant ("the second defendant") was the owner of a piece of land on which it had developed medium costs apartments known as the Vista Damansara Apartment. In 2005, the second defendant entered into 18 agreements with the respondent ("the plaintiff") for the sale and purchase of 18 units of apartments ("the principle agreements") the purchase price for which were paid in full in 2005 itself. Vacant possession of the apartments was to have been delivered on or before May 18, 2008. The plaintiff subsequently discovered that the second defendant had in April 2007 sold the land to Seacera Development Sdn Bhd ("the first defendant") and that the transfer of the land was effected in March 2008.

Resulting from the second defendant's failure to comply with the terms of the principle agreements, the plaintiff in 2010 commenced proceedings against the second defendant seeking inter alia a declaration that it is the lawful and/or beneficial owner of the 18 units of apartments; that the sale and transfer of the land to the first defendant is null and void for contravention of s 8 of the Housing Development (Control and Licensing) Act 1966 ("the Act") and contrary to its lawful interest; and that the first defendant is a trustee of the plaintiff's lawful and/or beneficial interests in the said land. The plaintiff also sought specific performance of the principle agreements by the second defendant and/or the first defendant.

The claim was opposed by the second defendant on the grounds inter alia that at the material time when the principle agreements were entered into, the project

had been abandoned and that the said agreements were entered into for the purpose of securing a loan that it had obtained from the plaintiff and not to evince a sale or purchase of the 18 apartments. The High Court found in favour of the plaintiff and allowed its claim. In arriving at its decision, the High Court was of the view that the principle agreements are not sham agreements as alleged but are genuine agreements and that the transfer between the first and second defendants contravened s 8 of the Act. The appeal by the first defendant against the said decision was allowed. Hence the instant appeal by the second defendant.

The second defendant submitted that the principle agreements in essence are sham transactions and are unlawful and unenforceable; that full payment thereunder was in fact never made; and that s 8 of the Act is inapplicable in this instance. It was further also submitted that in the circumstances of the case, specific performance is impossible, absurd and not a suitable remedy since the Vista Damansara Apartment project had since been transformed from a medium cost project into the Boulevard Residences which is a high-end and different project altogether.

Issues

1. Whether the principle agreements are genuine or sham agreements.

2. Whether the transfer between the first and second defendants contravened s 8 of the Act.

3. Whether in the circumstances of the instant case where a medium cost project had been abandoned and revived into a high end project, specific performance would not be an appropriate remedy.

Held, allowing the appeal in part; order pertaining to specific performance of all 18 sale and purchase agreements, set aside and in lieu, plaintiff entitled to damages to be assessed; parties to bear own costs

1. (a) It was for the defendants to prove and which they had failed to, that the principle agreements are a sham. In the premises, the High Court was correct to have found that the said agreements are in fact genuine agreements. [*see p 236 para 22 - p 237 para 24*]

   (b) As regards the contention that the project had been abandoned, based on the totality of the evidence and the evidence in form of the photograph taken by the second defendant showing a crane at the project site, it could not be said that the High Court was wrong to have concluded for a fact that work was still ongoing at the site. [*see p 237 para 25 - p 238 para 28*]

(c) Contrary to the second defendant's allegation of non-payment by the plaintiff under the principle agreements, the evidence adduced by the plaintiff clearly evinces the fact that a sum of RM2,269,912.15 was in indeed paid for the purchase of the 18 apartments. In this regard the letter from the second defendant dated December 14, 2005 acknowledging receipt of the said sum, amounts to an admission of the fact that the said sum was paid to it or for its benefit. It is beyond dispute that despite this apparent admission, the second defendant has refused to abide by its contractual obligation to transfer the title to the 18 apartments to the plaintiff. [*see p 238 para 29 - p 240 para 36*]

2. Based on the evidence, the High Court's finding that the transfer between the first and second defendant contravened s 8 of the Act, does not warrant intervention. In order for the transaction to assume the legal stature as required under the law, the prior approval of the Controller is required. By its failure to prove that such approval had been obtained and to produce the same, it must necessarily be inferred that the second defendant had in fact not obtained such approval. In this regard and bearing in mind that the first defendant had pursuant to a consent order entered into with the plaintiff agreed to transfer all of its rights and interests in the 18 apartments to the second defendant, the sum total of it all is that the first defendant no longer has a legitimate legal basis to dispute the decision of the High Court. In the circumstances, there is ample evidence for the plaintiff to succeed in its claim against the second defendant. [*see p 241 para 38 - p 242 para 44*]

3. Specific performance is an equitable remedy which is available to an aggrieved litigant not as a matter of course as a legal relief. In the circumstances of the instant case and bearing in mind s 21(2)(b) of the Specific Relief Act 1950, it would not be a proper nor a judicious exercise of discretion to grant an order of specific performance against the second defendant. Instead, a monetary compensation in relation to the 18 units of apartments would be the appropriate remedy to be awarded to the plaintiff as damages in lieu of specific performance. [*see p 242 para 45 - p 244 para 52*]

Cases referred to by the court

Balbeer Singh a/l Karam Singh & 6 Ors v Sentul Raya Sdn Bhd [2014] 2 AMCR 669; [2014] 5 MLJ 491, CA *(ref)*

Ho Shee Jan v Hidayat Harta Holdings Sdn Bhd [1989] 1 MLJ 33, SC *(foll)*

Lee Ing Chin @ Lee Teck Seng & 4 Ors v Gan Yook Chin (p) & Anor [2003] 2 AMR 357; [2003] 2 CLJ 19, CA *(ref)*

M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC *(ref)*

Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC *(ref)*

Legislation referred to by the court

Malaysia
Evidence Act 1950, ss 91, 92
Housing Development (Control and Licensing) Act 1966, s 8
Specific Relief Act 1950, s 21(2)(b)

Justin Voon and *Alvin Lai* (Justin Voon Chooi & Wing) for appellant
Robert Lazar, Sanjay Mohan, Aarthi Jeyarajah, K Gobinath and *Wong Li-Wei* (Mohanadass Partnership) for respondent

Appeal from High Court, Shah Alam – Civil Suit No. 22NCvC-5-2011

Judgment received: October 4, 2019

Abang Iskandar Abang Hashim JCA *(delivering the judgment of the court)*

Brief facts of the case

[1] Rumaya Properties Sdn Bhd ("the plaintiff") and Antara Vista Sdn Bhd ("the second defendant") had entered into 18 sale and purchase agreements ("the said principal agreements"), all dated May 19, 2005 where the second defendant agreed to sell 18 units of apartment known as Vista Damansara Apartment which were to be erected on the second defendant's land ("the said land").

[2] Clause 26(1) of the said principal agreements provided that vacant possession should be delivered to the plaintiff within 36 months from the date of the said principal agreements, namely on or before May 18, 2008.

[3] It was the plaintiff's case that all the 18 properties purchased by the plaintiff had been paid in full to the second defendant in 2005.

[4] It was also the plaintiff's case that, the second defendant had on April 27, 2007 entered into a sale and purchase agreement with the first defendant wherein the second defendant agreed to sell the said land to the first defendant for a purchase price of RM5,000,000.00. The said land was transferred to the first defendant on March 11, 2008 despite the fact that the defendants at all material times, had actual knowledge and notice of the plaintiff's interest on the said apartments on the said land.

[5] The plaintiff came to know about the transfer of the said land on June 2008 and subsequently on June 26, 2008, lodged a private caveat on the said land.

[6] After the defendants had failed to comply with the said principal agreements although several demands to do so had been made, the plaintiff on

October 11, 2010 commenced legal action against the defendants. In essence, the plaintiff was claiming for the following reliefs:

a. Declaration that the plaintiff is the lawful and/or the beneficial owner of the 18 units of medium cost apartment corresponding with the purchase under the said principal agreements;

b. Declaration that the sale and purchase agreement between the first and second defendant and the transfer of the land to the first defendant is in contravention to s 8 of the Housing Development (Control and Licensing) Act 1966 and thus null and void and be set aside;

c. Declaration that the sale and purchase agreement between the first and second defendant and the transfer of the said land to the first defendant is contrary to the lawful interest of the plaintiff and thus null and void and be set aside;

d. Declaration that the first defendant is a trustee for the plaintiff with respect to the plaintiff's lawful and/or beneficial interest or ownership in the said land;

e. Specific performance of the said principal agreements by the second defendant and/or the first defendant; and

f. Damages.

Case for defendant/defence

[7] The second defendant's defences have been that the said principal agreements were only entered into to secure a loan given by the plaintiff to the second defendant and were not intended to evince a sale nor purchase of the said 18 apartments between the parties thereto. Therefore the plaintiff is not entitled to the 18 apartments. Furthermore, the Vista Damansara is an abandoned project when the said principal agreements were signed. The second defendant also alleged that the plaintiff had failed to prove that there was payment made for the 18 apartments.

Findings of High Court

[8] It has to be noted that, before the full trial commenced at the High Court, a consent order dated October 11, 2011 was entered into between the plaintiff and the first defendant whereby the first defendant had to transfer all the 18 units of apartments named as Vista Damansara to the second defendant until such time that the court makes a decision as to who is the lawful registered owner of the said 18 apartments.

[9] After the consent order was entered, the first defendant did not participate actively in the High Court proceedings anymore and the trial proceeded between

the plaintiff and the second defendant only. The plaintiff also did not amend the pleaded claim against the second defendant. The first defendant did not even make submissions at the end of the whole case in the High Court.

[10] However, at the end of the High Court trial, the learned High Court judge, on November 21, 2014, allowed the plaintiff's claim against both defendants which led to the appeals by both defendants to the Court of Appeal.

The appeals

[11] Appeal by the first defendant was registered under Court of Appeal, Civil Appeal B-02(NCvC)(W)-11-01/2015 while the appeal by second defendant is registered under Civil Appeal B-02(NCvC)(W)-13-01/2015. Initially, pursuant to the Court of Appeal order dated February 5, 2015, the appeals are to be heard together. However on December 9, 2016, parties agreed that the consent order should be preserved. Thus the Court of Appeal allowed the appeal by the first defendant leaving behind Appeal B-02(NCvC)(W)-13-01/2015 by the second defendant for this court's determination.

[12] We had the opportunity to hear both parties on August 8, 2017 but we then reserved the decision to a date to be informed later. This is now our decision and our reasons for having so decided.

[13] During the hearing of the appeal before us, the second defendant as the appellant in this appeal submitted the following issues:

a. Illegality – the 18 SPAs are unlawful and unenforceable as they were sham transactions and never intended to convey to the plaintiff any interest in the said 18 units of the medium cost apartment known as Damansara Vista;

b. Specific performance is impossible, absurd, and not a suitable remedy;

c. Inordinate delay by the plaintiff in seeking the remedy of specific performance;

d. The consent order between the plaintiff and the first defendant;

e. The 18 SPAs are sham agreements;

f. The plaintiff did not make full payment under the 18 SPAs; and

g. Section 8 of the Housing Development (Control and Licensing) Act 1966 ("the Act") is not applicable herein.

Our findings

[14] Having heard submissions by all learned counsel, we would deal with this appeal by broadly approaching the same in respect of the issues of

illegality/sham, non-payment of full purchase price and specific performance. In respect of the specific performance issue, the question was whether in the circumstances of this case, specific performance would be an appropriate remedy that ought to have been granted by the learned High Court judge, in the event that the plaintiff's claim is indeed sustainable, namely if the liability can stick on the second defendant. We will also deal with the issue pertaining to the consent order that was entered into between the plaintiff and the first defendant.

Whether the 18 sale and purchase agreements were a sham and/or are illegal arrangements

[15] The material facts as established by the evidence as led before the learned High Court judge had shown that the second defendant was granted licence by the State Authority of Selangor to build on the said land 300 units of medium cost houses valued at RM95,000.00 each and 60 units of shop houses valued at RM650,000.00 each. As a consideration thereto, the second defendant had covenanted to build low cost houses valued at RM25,000.00 each and that these units were to be sold to the squatters who had until that time were occupying the said land.

[16] It was also in evidence that sometime in 2004, the second defendant had sold part of the land where the commercial units were to be located. A company known as Newlake Development Sdn Bhd would eventually develop those commercial units for the second defendant.

[17] It was in the context whereby the second defendant was in need of funds for the continued development of the said housing project that the second defendant had approached the plaintiff for a loan. It was the plaintiff's case that instead of providing the loan the conventional way, the plaintiff preferred to purchase 18 units of apartments in the medium costs development. It was the plaintiff's case that the purchase price paid by the plaintiff to the second defendant towards the purchase of the said 18 units was used towards the construction costs.

[18] To begin with, there was no denying that both the plaintiff and the second defendant had signed the 18 principal agreements in relation to the 18 units of medium cost apartments known as Damansara Vista. That fact was not in dispute. What was disputed had appeared to be what those 18 agreements were meant to be. To the plaintiff they evinced the sale and purchase of the 18 said units. To the second defendant, it was but a sham. It was a sham because they were, for all intents and purposes devised as a vehicle to camouflage what was in truth a loan agreement given by the plaintiff to the second defendant.

[19] One of the cardinal rules of interpretation of a contractual document has been that the court ought not to look beyond what was contained within the four walls of the contract document. The contract document must contain within its four walls what the parties have agreed to be bound for, in the performance of the contract. What is not contained within its four walls would necessarily mean that

such omission was intentionally so omitted by the contracting parties. It is not the role of the court to read into the contract documents what was not expressly spelt out in the contract. The court's role is to interpret, not to re-write, the contract document for the parties. In the Federal Court case of *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 learned Justice Chang Min Tat FJ had occasion to state that "where a contract has been reduced to writing, it is in the writing that we must look for the whole of the terms made between the parties."

[20] Once the agreement has found expression in the written form, no parole evidence is permitted nor admissible to contradict what was already written therein. In the Malaysian context, ss 91 and 92 of the Evidence Act 1950 has provided for such statutory embargo against admissibility of such parole evidence.

[21] In this case before us, we noted that the learned High Court judge had referred to the Supreme Court case of *Ho Shee Jan v Hidayat Harta Holdings Sdn Bhd* [1989] 1 MLJ 33 where the then apex court had made the following observation. We proceed to quote the same:

> In fact in clause 7 there is no reference to any loan transaction. Moreover, Hidayat is prevented by ss 91 and 92 of the Evidence Act from saying that the three agreements dated February 14, 1985 are not sale and purchase agreements for money loans.

[22] We find that there is seeming similarity with the 18 sale and purchase agreements as well. There was no reference in any of them to any loan agreement between the parties. It was up to the defendants to allege that these were a sham, but with due respect, they had failed to prove the same. We therefore affirm the learned High Court judge's finding that the 18 main agreements pertaining to the 18 units of Vista Damansara apartments are genuine agreements. They are not sham documents as alleged by the second defendant.

[23] In light of such evidence, we are not surprised that the learned High Court judge had decided the way he did. We now reproduce verbatim the findings of the learned High Court judge on this issue relating to the 18 sale and purchase agreements:

> Terdapat sejumlah 18 perjanjian jual beli antara pihak plaintif dan defendan kedua berkaitan pembelian 18 unit pangsapuri tersebut yang di tandatangani pada Mei 19, 2005. Fakta tersebut tidak dapat dinafikan dan tiada keterangan daripada pihak defendan kedua yang menidakkan kewujudan atau kepalsuan perjanjian ini atas imbangan kebarangkalian. Oleh itu, mahkamah tidak dapat menerima hujah peguam defendan kedua bahawa plaintif bukanlah pembeli hartanah tersebut [see paragraph 23 of GOJ of the learned High Court judge].

[24] We affirm his findings that the 18 sale and purchase agreements existed and that they were what they set out to be and that they were not sham documents

which were allegedly created by the plaintiff to camouflage what were in fact loans transaction between the litigating parties. The learned High Court judge had rejected the allegation of "kepalsuan" surrounding the 18 agreements in relation to the medium-cost apartments, Damansara Vista.

[25] It was also alleged by the second defendant that it was impossible and illogical for the plaintiff to have purchased the 18 units of the medium cost apartments at the material time as during that time, the project had been abandoned. Towards this end, the second defendant had led evidence in the form of photographs to evince that factum of the project had been abandoned. In fact, the learned High Court judge had referred to these photographs in his grounds of decision in paragraph 17 therein, in particular a photograph in bundle J at p 25. It was noted that the purpose of leading in evidence the photograph had been to show that the project involving the said land was an abandoned project.

[26] The learned High Court judge had considered this evidence and had come to the following observation, as we have seen at paragraph 21 in his grounds of judgment, like so:

> Mahkamah juga mendapati bahawa hujah peguam defendan kedua tidak selari dengan keterangan yang ada. Gambar yang dirujuk oleh pihak defendan kedua didapati masih terdapat menara kren di tapak projek. Sepertimana diketahui umum bukannya murah untuk menyewa menara kren dan jika projek telah terbengkalai pada masa gambar diambil, semestinyalah menara kren ini tidak ada di situ untuk mengelak kerugian berpanjangan. Penelitian juga mendapati bahawa defendan kedua telah mengeluarkan "letter of award" bertarikh 19.4.2005 kepada Magna Glow Sdn Bhd untuk kerja-kerja pembinaan pangsapuri kos sederhana (rujuk ms 912-915 ikatan dokumen B5). Malah terdapat satu surat daripada SP1 bertarikh Mei 5, 2005 kepada defendan kedua yang mengesahkan bahawa pembayaran 18 unit pangsapuri tersebut akan dibayar terus kepada Magna Glow Sdn Bhd serta pihak-pihak lain yang terlibat dengan pembinaan pangsapuri kos rendah (rujuk ms 2-3 ikatan dokumen H). Oleh itu bagaimana mungkin pihak defendan kedua menyatakan bahawa projek telah terbengkalai pada 2004.

[27] In fact, the same photograph tendered by the second defendant showed that there was a crane at the project side, which the learned High Court judge had meant that work was still on-going at the project site as it was expensive to engage a tower crane and then leaving it idle and not being put to use. Taking all the evidence before him in totality, the learned High Court judge expressed his conclusion on this "abandoned project" issue at paragraph 22 as follows:

> Oleh itu mahkamah mendapati bahawa tiada asas bagi pihak defendan kedua menyatakan bahawa projek telah terbengkalai pada tahun 2004. Malah mahkamah ini juga mendapati bahawa tiada asas juga bagi pihak Defendan Kedua menyatakan bahawa semasa perjanjian jual beli hartanah tersebut ditandatangani, projek terbengkalai. Adalah tidak masuk akal untuk pihak

plaintif membuat pembayaran sejumlah lebih dari dua juta ringgit jika defendan kedua tiada niat untuk meneruskan projek tersebut.

[28] In light of such evidence, we are of the view that it could not be said that the learned High Court judge had been plainly wrong in his conclusion on the matter. It was a finding of fact by him and we find that it is a reasonable finding by him and we find no cogent reason to disturb the same.

[29] As regards the payment issue, it has been the second defendant's contention that the plaintiff had failed to prove that it had indeed paid for the 18 units of apartments. From the evidence that was led by the plaintiff, there was a letter dated December 14, 2005 that would evince the fact that the sum of RM2,269,912.15 had been paid by the plaintiff for the purchase of such apartments. The learned High Court judge had taken note of this crucial fact and accepted it as proof of such payment having been made by the plaintiff for the 18 units of the apartments. He had stated as follows, in his grounds of judgment, at paragraph 27 therein:

Terdapat sepucuk surat daripada defendan kedua bertarikh Disember 14, 2005 yang mengesahkan bahawa pembayaran telah dibuat oleh plaintif sepertimana terma yang dipersetujui kedua-dua pihak (lihat ms 563 ikatan dokumen B4).

[30] We agree with the submission by learned counsel for the plaintiff that this letter by the second defendant amounts to an admission of the fact that the sum of RM2,259,912.15 was paid to the second defendant or for their benefit. A reference to p 312 line 31 to p 313 line 26 of the notes of proceedings would evince such factual situation rather conclusively:

SJM : B4, My Lord. Datuk, ini adalah surat Datuk bertarikh Disember 14, 2005 kan?

Ismail : Ya.

SJM : Datuk, ini adalah surat yang merekodkan bahawa jumlah RM2,259,912.15 telah pun diterima atau pun dibayar oleh pihak plaintif kan? Betul tak?

Ismail : Betul.

SJM : *Dan Datuk telah juga mengatakan bahawa jumlah tersebut telah shall be treated as a set-off for the purchase price of the 18 units. So ini adalah bayaran untuk jual-beli 18 unit tersebut kan?*

Ismail : *Ya.*

SJM : *Last sentence, Datuk, last paragraph. In the circumstances we hereby confirm that the total price for the properties as stated in the sale and purchase agreements all dated May 19, 2005 have been fully settled. Jadi pihak plaintif mengikuti surat ini telah membayar semua duit untuk 18 unit kepada pihak defendan? Betul?*

Ismail : *Ok. Betul.*

SJM : *Jadi jikalau meneliti surat ini Datuk, pihak plaintif telah membuat bayaran sebanyak RM2.256 juta kepada defendan atau pun bagi pihak defendan. Betul?*

Ismail : *Ya.*

[Italics added by us for emphasis.]

[31] With respect, we find that such an admission made by the main witness for the second defendant to be more than apparent. With this kind of evidence having been admitted in court that directly addressed the issue as to payment for the 18 units of apartments, the conclusion that ought to be drawn from it must be one that is irresistible. The learned High Court judge had concluded that full payment had been made for the 18 units by the plaintiff. Again, we find that such a finding has been one that is founded upon clear evidence that was led before him. It was one that was well justified and it does not warrant our appellate intervention.

[32] In fact, the second defendant had alleged that the letter was obtained from the second defendant by coercion or otherwise by perpetration of duress by the plaintiff. That allegation was given a short shrift by the learned High Court judge who found the same to be baseless and was devoid of credibility for it to be taken seriously so as to have any vitiating effect, if such was the intention. The learned High Court judge had his reasons for arriving at such a conclusion. We found his reasons nestling in paragraph 27 of his grounds of judgment like so:

> Defendan kedua menyatakan bahawa surat tersebut dikeluarkan secara paksa tetapi penelitian mahkamah mendapati tiada keterangan menunjukkan ke arah itu. Tambahan jika sekiranya surat tersebut dikeluarkan secara paksa atau tiada pembayaran dibuat langsung oleh pihak plaintif, kenapa pihak defendan kedua tidak mengambil apa-apa tindakan untuk mempertikaikan 18 perjanjian jual beli pangsapuri ini. Tambahan, pihak defendan kedua boleh juga mengeluarkan satu surat untuk menafikan kandungan surat bertarikh Disember 14, 2005. Ketiadaan tindakan diambil oleh pihak defendan kedua menunjukkan bahawa sebenarnya terdapat pembayaran oleh pihak plaintif kepada defendan kedua.

[33] It was noted too that there was no police report made pertaining to the alleged duress having been exercised upon the second defendant. The obvious lack of crucial contemporaneous documents emanating from the second defendant must have impacted the learned High Court judge in the manner in which he came to make the inferences against the second defendant given the circumstances of the case before him. All these go to credibility, or rather the lack of it on the part of the second defendant's contention. They have remained bare allegations, without more. With respect, we are in agreement with the inferences that were made by the learned High Court judge. We find them to be reasonable and justified.

[34] It also did not escape our attention that there was a last ditch attempt on the part of the second defendant to contradict the evidence of full payment for the 18 units by it calling one person by the name of Tapah anak Atah who had testified as SD3 who was a director and shareholder of Magna Glow Sdn Bhd. It was the plaintiff's case that it had made payments to Magna Glow Sdn Bhd directly so that the low cost apartments could be completed as required. He was apparently called to the stand to negate payment having been made by the plaintiff to Magna Glow. Indeed, that was what he said during examination-in-chief. But during cross-examination by learned counsel for the plaintiff, his evidence unravelled and it had come to pass that actually, SD3 spent most of his time in Sarawak and that the daily management of Magna Glow Sdn Bhd was left mostly in the hands of husband and wife combo of Low Chin Kiat and his wife.

[35] Having admitted that to be so, SD3 was then asked the ultimate question, like so: "SMJ: OK. Adakah Encik Tapah tahu terdapat bayaran daripada pihak Rumaya Properties ataupun Dato Azizi kepada Magna Glow?" And the inevitable answer, to that pointed question, coming from SD3 was, "Tapah: Tidak tahu saya." So, instead of rebutting the factum of payment having been made by the plaintiff for the 18 units, SD3's honest but dismal answer was far from delivering such desired effect expected of him by the second defendant. SD3 did not possess the positive factual knowledge to displace the plaintiff' case on full payment having been made for the 18 units of medium cost apartments that was Vista Damansara, let alone establishing on the balance of probabilities that there had been no full payment. The learned High Court judge was right in his finding pertaining to the payment issue, and we do not propose to interfere with such a finding by him.

[36] It is also beyond any dispute that despite this apparent admission by the second defendant, it had refused to abide by its contractual obligation to transfer the title to the said 18 apartments into the name of the plaintiff.

The transfer between first and second defendants

[37] From the evidence adduced, we are in agreement with the learned High Court judge that the sale and purchase agreements between the first defendant and the second defendant and the transfer of the said land to the first defendant is in contravention of s 8 of the Housing Development (Control and Licensing) Act 1966 and as such his Lordship's order that the same be set aside is hereby affirmed. The finding of the learned High Court judge on this issue can be found in paragraph 25 of his grounds of judgment where his Lordship has stated as follows:

> [25] Adalah tidak dinafikan bahawa defendan pertama dan defendan kedua memasuki satu perjanjian jual beli berkaitan tanah tersebut (iaitu di mana 18 unit pangsapuri berkaitan didirikan) pada April 27, 2007. Plaintif berhujah bahawa pada masa perjanjian tersebut ditandatangani, defendan kedua mengetahui bahawa terdapat 18 perjanjian jual beli telah ditandatangani dengan plaintif sebelum itu.

Pihak defendan kedua meneruskan juga perjanjian jual beli dengan defendan pertama tanpa mendapat kelulusan dari Controller of Housing sepertimana diperuntukkan oleh s 8 Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Pihak plaintif menegaskan bahawa jika terdapat kelulusan, dokumen tersebut semestinya berada dalam milik defendan kedua dan beban adalah pada pihak defendan kedua membuktikan bahawa mereka mempunyai kelulusan daripada Controller of Housing dalam menandatangani perjanjian bertarikh April 27, 2007 itu. Defendan kedua pula menegaskan bahawa dengan pihak plaintif dan defendan pertama memasuki penghakiman persetujuan antara mereka, oleh itu alegasi ini telah diabaikan (abandoned) oleh pihak plaintif. Dalam konteks ini, mahkamah bersetuju dengan hujah peguam plaintif. Plaintif menegaskan bahawa penghakiman persetujuan tersebut hanya untuk memastikan status quo 18 unit pangsapuri tersebut terpelihara tanpa mengabaikan kes yang diplid terhadap defendan kedua. Kelulusan Controller of Housing adalah fakta di dalam pengetahuan pihak defendan kedua dan defendan kedua sepatutnya mengemukakan keterangan bahawa mereka telah memperolehi kebenaran sepertimana diperuntukkan oleh undang-undang tersebut.

[38] From the evidence that were advanced, we could see no reason as to why we should interfere with the learned High Court judge's finding on this issue that pertained to s 8 of the Housing Development (Control and Licensing) Act 1966. The approval of the controller was required before the transaction that was entered into by the second defendant (the appellant before us) and the first defendant could assume the legal stature as required under the law. Whether the approval from the controller had indeed been obtained is a factum that was within the knowledge of both of them. It was a fact within their special knowledge and in such a circumstance the onus was on the second defendant to show proof that the approval from the controller had been obtained and this can be done by simply producing the approval document. By the second defendant failing to so produce the same it must necessarily be inferred that no such approval had been obtained by the second defendant. We are in agreement with the learned High Court judge when he had so concluded the way he did.

[39] As to the effect of that declaration which was successfully obtained by the plaintiff, it must necessarily be that the 18 titles in respect of the apartments never left the second defendant as the void agreement that was entered into between the second defendant and first defendant was not capable of transferring any title to the latter.

[40] So what would become of the consent order dated November 11, 2011? The plaintiff had contended that pursuant to the consent order dated November 11, 2011, the first defendant had agreed to transfer all rights and interest in the 18 apartment units to the second defendant within 30 days from the date of the order.

[41] The plaintiff had also contended that by agreeing to transfer all rights and interest in the 18 apartment units to the second defendant, the first defendant had

relinquished its interest in the 18 apartments and that it will abide by the order of the High Court (or the Court of Appeal).

[42] With respect, we agree with the contention of the plaintiff's learned counsel in respect of the said consent order. The sum total of it all would be that the first defendant no longer has a legitimate legal basis to dispute the decision of the High Court. Its obligation lies in merely complying with the order of the High Court.

[43] In the circumstances, we are all in agreement that there was more than ample evidence that was necessary for the plaintiff to succeed in its claim against the second defendant. The findings and inferences that the learned High Court judge had concluded and arrived at had not been bare conclusions. They were made based on evidence that were placed before him and as he had the distinct audio-visual advantage of observing the demeanour of the witnesses who had testified before him, we ought to give him the deference that it deserved. There was nothing that would have warranted us to say that his advantage had been severely compromised, by say, if he had mishandled the evidence that were adduced before him. In fact, there had been none of that sort. The fact that we may have come to different findings from him per se would be insufficient ground to disturb his findings. To be able to do that, it must have been shown that he had been plainly wrong. We are not able to say that the learned High Court judge had committed that kind of error. That trite principle can be found in the decision of the apex court in the case of *Lee Ing Chin @ Lee Teck Seng & 4 Ors v Gan Yook Chin (p) & Anor* [2003] 2 AMR 357; [2003] 2 CLJ 19 where the learned Justice Gopal Sri Ram JCA (as he then was) had put:

> We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice to say that we re-affirm the proposition that an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.

[44] In the circumstances, we agree with Mr Robert Lazar, learned counsel for the plaintiff that the learned High Court judge was correct when he ruled that the plaintiff had proven its case against the second defendant on the balance of probabilities.

Should an order of specific performance be, in the circumstances, the appropriate order to be granted as a remedy

[45] However, having established that the second defendant was liable, the next issue would be to consider whether specific performance can in the circumstances be granted as prayed for by the plaintiff in this case and which the learned High Court judge had so granted in the court below. We are with the second defendant on this issue of specific performance. Specific performance is

an equitable remedy and is therefore available to an aggrieved litigant not as a matter of course as a legal relief.

[46] In the cases where specific performance was granted, it was so granted to the litigant when a monetary compensation was not an adequate remedy to address the wrong suffered by the aggrieved plaintiff in the circumstances of the cases. Being an equitable remedy, it lies entirely in the hands of the court whether an order of specific performance ought to be granted to the plaintiff. In the apex court case of *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 it was held that the granting of an order of specific performance, being discretionary in nature, must be done judiciously without any caprice.

[47] As a matter of law, s 21(2)(b) of the Specific Relief Act 1950 spells out how such discretion ought to be exercised if the court is not minded to issue an order of specific performance. It states:

> 21. (1) ...
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) ...
>
> (b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

[48] Before us, Mr Justin Voon, learned counsel for the second defendant submitted that in the event that the plaintiff was successful in establishing the claim for the declaration, the court ought not to order specific performance against his client ("the second defendant") in respect of the said 18 properties as they are no longer in existence, meaning to say, in the form that they were when they were purchased by the plaintiff from the second defendant. In fact, learned counsel had, in his written submissions stated as follows:

> *It is impossible and absurd – the D1 has developed the units in a DIFFERENT PROJECT which bears no resemblance to the 18 units. In fact, the P wants an unjust enrichment.*

[49] He had also cited the decided case of *Balbeer Singh a/l Karam Singh & 6 Ors v Sentul Raya Sdn Bhd* [2014] 2 AMCR 669; [2014] 5 MLJ 491 to support his contention before us that a monetary compensation was the proper remedy to be awarded in lieu of specific performance. Having perused through the grounds of judgment of the learned High Court judge, we noted that he had not dealt with the issue of specific performance in any much detail, save that he granted the prayer for such remedy at the end of his decision. We could only venture to surmise that he had taken that approach on account of the fact that the plaintiff had succeeded in establishing its case against the second defendant.

[50] In the circumstances of this case, it was also submitted before us that the Damansara Vista apartments had since then been transformed into Boulevard Residences, a different project altogether although developed by the second defendant nevertheless. The Boulevard Residences represents a high-end condominium project, whereas the 18 apartments transacted between the parties in 2005 had been medium cost apartments. Not to mention, innocent third parties may be adversely affected through no fault of theirs, completely. We did not recall having heard any violent objections nor any coherent submissions to the contrary advanced from the plaintiff's side on this issue.

[51] As such, in line with the dictates of s 21(2)(b) of the Specific Relief Act 1950, we are of the considered view that some difficulties may befall the second defendant which it did not foresee, if an order of specific performance were to be issued against it and that whereas, at the same time, its non-performance would involve no such hardship on the plaintiff.

[52] In the circumstances, we are of the considered view that it would not be a proper nor a judicious exercise of discretion, if an order of specific performance were to be granted against the second defendant. We therefore agree with the learned counsel for the second defendant that a monetary compensation would be the appropriate remedy to be awarded to the plaintiff in relation to the 18 units of medium-cost apartments that formed the subject matter of the 18 principal agreements. We order that the compensation as damages in lieu of specific performance be assessed by the same learned High Court judge accordingly.

Conclusion

[53] *In the upshot*, we hereby affirm the High Court judge's finding on the declarations save that we would vary his order made in relation to the order by him granting specific performance against the second defendant. *As such*, having considered all the submissions, oral and written, as well as the records of appeal, we would allow this appeal by the second defendant *in part*. We would therefore vary the order of the learned High Court judge in that the order pertaining to the specific performance of all the 18 sale and purchase agreements be set aside. *In lieu* of the same, we order that the plaintiff is entitled to damages which is to be assessed by the same learned trial judge. We affirm the rest of the High Court judge's decision.

[54] *As to costs*, in light of our decision as pronounced above, we order that the parties bear their own costs.

[55] *As to deposit*, we order that it be returned to the second defendant.

[56] We so order.