

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
SUIT NO. S3-22-129- 1992**

BETWEEN

**1. LEE MEE MEE
2. LEE YING YING** ... **PLAINTIFS**

AND

ESTHER WAI POH YAN ... **DEFENDANT**

JUDGMENT OF THE COURT

Background Facts

1. The Plaintiffs are sisters. They had purchased by an agreement dated 08/07/1991 (“the SPA”), from the Defendant a town house known as Unit No. C366A, Sri Hartamas, Kuala Lumpur with a postal address at No. 81A, Jalan 2/70 Phase 3, Sri Hartamas, Town House, Kuala Lumpur (“the said property”) at a purchase price of RM138,000.00.
2. The Defendant is the beneficial owner of the said property and had agreed to sell it to the Plaintiffs pursuant to the terms of the

SPA. The Developer of the said property is Sri Hartamas Development Sdn. Bhd. (“the Developer”).

3. Messrs Fernandez, D’Silva Puri & Partners (“the Plaintiffs’ Solicitors”) had represented the Plaintiffs in the said sale transaction, whilst the Defendant was represented by Messrs Faeizah Kerk Bong & Associates (“the Defendant’s Solicitors”).
4. For ease of reference, the relevant clauses in the said SPA are reproduced as follows:-

“1. AGREEMENT FOR SALE

The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the Said Property and all those the Vendor’s rights title and interest in to and under the Principal Sale Agreement and the First Deed of Assignment at a total purchase price of Malaysian Ringgit One Hundred and Thirty Eight Thousand (M\$138,000-00) only (hereinafter referred to as “the Total Purchase Price”) and upon the terms and conditions herein contained.

2. CONDITIONAL AGREEMENT

2.1 *This Agreement shall be conditional upon the obtaining by the Vendor of the consent in writing by the Developer to the sale by the Vendor to the Purchaser of the Said Property and the assignment by the Vendor to the Purchaser of all her rights title and interest in to and under the Principal Sale Agreement and the First Deed of Assignment and the Said Property comprised therein.*

2.2 *Upon the execution of this Agreement, the Vendor shall forthwith or as soon as may be write to the Developer for the consent referred to in Clause 2.1. hereof.*

2.3 *In the event the Developer refuses to grant its consent aforesaid or the consent aforesaid is not granted within three (3) months from the date hereof, the Purchaser shall be entitled by notice to the Vendor to rescind this Agreement whereupon the Vendor shall forthwith refund to the Purchaser without interest, all*

moneys paid under this Agreement by the Purchaser to the Vendor.

3. *PAYMENT OF THE TOTAL PURCHASE PRICE*

3.1. *The Total Purchase Price shall be paid by the Purchaser at the times and in the manner following:-*

3.1.1. *a sum of Malaysian Ringgit Thirteen Thousand Eight Hundred (M\$13,800-00) only representing ten per centum (10%) of the Total Purchase Price (hereinafter referred to as “the Deposit”) shall be paid to the Vendor upon the execution of this Agreement; and*

3.1.2. *subject to the fulfilment of the condition referred to in Clause 2.1. hereof, a sum of Malaysian Ringgit One Hundred and Twenty Four Thousand Two Hundred (M\$124,200-00) only representing ninety per centum (90%) of the Total Purchase*

Price (hereinafter referred to as “the Balance Purchase Price”) shall be paid to Messrs Faeizah Kerk Bong & Associates of Lot 20.4, 20th Floor, Menara Maybank, 100, Jalan Tun Perak, 50050 Kuala Lumpur (hereinafter called “the Vendor’s Solicitors”) within three (3) months from the date of this Agreement.”

5. The Plaintiffs alleged that due to the Defendant’s failure to obtain the consent in writing from the Developer in accordance with clause 2.1. of the SPA, by 07/10/1991, or by the extended date line of 30/11/1991, as stated in the Plaintiffs’ solicitors’ letter dated 26/11/1991, the Plaintiffs’ then rescinded the SPA accordingly.

6. In the present suit, the Plaintiffs had abandoned their claim for specific performance and are only claiming for the following declaratory reliefs:-

- (a) a declaration that the said SPA was rescinded in accordance with the Plaintiffs' solicitors' letter dated 26/11/1991;
- (b) rescission of the SPA dated 08/07/1991;
- (c) refund of the deposit sum of RM13,800.00;
- (d) special damages of RM2,628.50;
- (e) general damages;
- (f) interest on the amount stated in paragraph (c), (d) and (e) at 8% per annum from 26/11/1991 till date of realisation;
- (g) costs;
- (h) such further relief as this Court deems fit and proper."

7. The Defendant's defence is that the consent as envisaged by clause 2.1. of the SPA had been obtained within the date line as stipulated in clause 2.3. i.e. on or before 7th October 1991.

8. The main bone of contention between the parties is whether the Defendant had obtained the written consent from the Developer for the sale of the said property by the Defendant to the Plaintiffs?

9. At the outset of the trial learned counsel for the Plaintiffs raised 2 preliminary objections:-

(i) that, Mr. Richard Teh should not be allowed to be the counsel for the Defendant as he might be called as a witness;

(ii) the absence of the Defendant at the trial.

10. After hearing submissions on the above two objections, I overruled both of them as I was satisfied that Mr. Richard Teh would not probably be called as a witness and that since the Defendant's counsel was present to conduct the defence, the case could be proceeded with since it was his own volition not to attend the trial.

11. The Plaintiffs called three witnesses to substantiate their claim. PW1 (1st Plaintiff) testified that upon execution of the SPA she then obtained a loan from Hong Kong Bank as evidence by the Bank's letter (exhibit P2) for the amount of 90% of the purchase price i.e. RM124,200.00. Then there was a letter dated 17/09/1991 from the Developer to the Defendant's solicitor (exhibit P4 – see Ikatan Dokumen bagi pihak Plaintiff (“IDP”))

page 26) giving a conditional consent to the Plaintiffs subject to 6 terms and conditions as follows:-

“We are to inform you that we are agreeable in principle to the requested assignment subject to the compliance of the following terms and conditions:-

- 1) *the redemption of the loan granted to your clients by Malayan Banking Berhad;*
- 2) *the prior receipt by us of a duly stamped Receipt and Reassignment from Malayan Banking Berhad in respect of the above unit;*
- 3) *the prior release by Malayan Banking Berhad and/or their Solicitors from our undertaking to forward one of them the strata title free from encumbrance and the duly executed Memorandum of Transfer in respect of the said unit and other relevant undertakings which were given by us;*

- 4) *your clients shall take all necessary steps to inform the relevant authorities of the assignment of the said agreement and if necessary to extend copies of the same to us;*
- 5) *you are to forward to us a draft copy of the Assignment for our perusal before we formally approve and consent to the same;*
- 6) *that the Purchaser shall pay us a sum of M\$750.00 in cash.”*

12. It is the Defendant's contention that the Developer's consent had been obtained as evident from the Developer's letter dated 17/09/1991 (exhibit P4) within the time stipulated in the SPA.

13. The whole issue in this case therefore hinges on the meaning given to the wordings of the Developer's letter dated 17/09/1991.

14. Looking at the contents of P4, however I agree with the submission of learned counsel for the Plaintiffs that the said

letter (P4) is only a conditional consent, subject to the Plaintiffs' compliance of the 6 terms and conditions stipulated therein. (See IDP pages 26 – 27). At most the said letter is only an intimation by the Developer that their consent would be executed on the Deed of Assignment only after the 6 conditions are complied with by the Defendant.

15. The Plaintiffs' financier's solicitors Messrs Skrine & Co., had by a letter dated 19/09/1991 (exhibit P5 – see IDP page 28) notified the Plaintiffs that they could not proceed with the security documentation as the Defendant's solicitors had failed to reply to their letter dated 06/09/1991 (exhibit P3 – see IDP page 25). This was followed up by the Plaintiffs own letter dated 27/09/1991 (exhibit P6 – see IDP pages 29 to 30) written directly to the Defendant's solicitors attaching copies of exhibit P3 and P5, informing the Defendant's solicitors that they had not taken any positive steps and that there was a delay of 6 weeks by the Defendant's solicitors for failing to reply to the Plaintiffs' financier's solicitor's letter (P5).

16. The Plaintiffs themselves jointly sent a reminder letter dated 03/10/1991 (exhibit P7 – see IDP pages 31 – 32) to the

Defendant's solicitors to expedite the matter. However the Defendant's solicitors never replied to the Plaintiffs' letter P6 and P7.

17. In fact the Plaintiffs' solicitor had by a letter dated 26/11/1991 (exhibit P8 – see IDP page 33) to the Defendant's solicitors given a final dateline to the Defendant's solicitor to obtain the consent from the Developer and, as it was not obtained by 30/11/1991, the Plaintiffs would rescind the SPA. This was due to the Defendant's solicitor's clerk i.e. Mr. Leong, indication to the Plaintiffs' solicitor's that he would try to obtain the consent by 20/11/1991.

18. The Defendant solicitors' reply to exhibit P8 is by a letter dated 28/11/1991 (exhibit P8 – see IPD page 44) whereby they only indicated that the Deed of Assignment had been executed and duly endorsed with the Developer's consent/acknowledgement. No where was it mentioned that the Developer's written consent had been obtained before the 7th October 1991.

Conclusion

19. From the evidence available, it is my finding that the SPA was subject to the Defendant obtaining the written consent of the Developer to enable the transfer/assignment of the said property from the Developer to the Plaintiffs. In spite of several reminders from the Plaintiffs solicitors and also the Plaintiffs, the Defendant still failed to get the requisite consent, as stipulated in the SPA.

20. Due to the Defendant's failure to get the said consent from the Developer, the Plaintiffs therefore rightfully rescinded the Agreement, pursuant to clause 2.3 of the SPA.

21. I would therefore allow the Plaintiffs' claim with costs. Damages are to be assessed by the Senior Assistant Registrar of the High Court.

Date: 23rd July 2009

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge

Mr. B. Tangaraj for the Plaintiff

Mr. Richard Teh for the Defendant