

## Ma Junxiang v Mayland Venue Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CASE NOS WA-22NCvC-255-04  
OF 2019 AND WA-22NCvC-259-04 OF 2019  
SU TIANG JOO J  
16 APRIL 2024

*Contract — Specific performance — Sale and purchase agreement — First agreements stated that properties purchased by plaintiff would be delivered with strata title — Plaintiff received properties with individual titles — Defendant argued that there were second agreements which stated that properties purchased by plaintiff would be delivered with individual title — Plaintiff sought specific performance of first agreements — Whether second agreements valid and binding on plaintiff — Whether signatures of plaintiff in second agreements were forged — Whether plaintiff approbating and reprobating in continuing to enjoy financing obtained via second agreements but wanting to have them declared unlawful — Whether plaintiff could challenge second agreements — Whether fraud had been proved — Whether plaintiff had legal burden to prove allegation of fraud — Whether plaintiff had ostensibly utilised second agreements — Whether defendant did perform his bargain — Evidence Act 1950 ss 73(1) & 92 — Strata Management Act 2013 — Housing Development (Control and Licensing) Regulations 1989 Schedule G & H*

*Legal Profession — Professional conduct — Advocate and solicitor acting for developer not to act for purchaser in housing development — Certificates made under s 84(1) of Legal Profession Act 1976 were not signed before Commissioner for Oaths — Whether certificates under s 84(1) of Legal Profession Act 1976 invalid — Whether advocate and solicitor liable for disciplinary proceedings — Legal Profession Act 1976 s 84(1), (2) & (6)*

The plaintiff had bought from the defendant three units of property pursuant to three sets of sale and purchase agreements (‘the first set of SPAs’) in the Schedule H format prescribed by the Housing Development (Control and Licensing) Regulations 1989. The problem arose when the defendant delivered two of the properties (‘Lot 197’ and ‘Lot 207’) to the plaintiff with individual titles instead of with strata titles. In this regard, considering that only the plaintiff had purchased the two units of properties for that phase of the developments, the defendant was concerned that it would not be commercially viable for both parties as the plaintiff would be the only one who would bear the costs for the maintenance and management of all the common property and common facilities. Following discussions between the defendant’s former

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A director, Mr Yee LangHeng and the plaintiff, the parties had entered into deeds of revocation to revoke the first set of SPAs and entered into the second set of SPAs in Schedule H format which were backdated to 30 August 2014 (collectively referred to as ‘the second set of agreements’). Regarding the second set of agreements, the plaintiff asserted that in the course of him executing documents for the change in name for the third unit of the properties (‘Lot 320’) which was not under dispute, he was made to sign many blank documents which were used by the defendant to make up the second set of agreements to defraud him. The plaintiff then brought two actions against the defendant to seek, inter alia, a declaration that the second set of agreements were invalid and for an order of specific performance of the first set of SPAs. The core issue was whether the second set of agreements were valid and binding on the plaintiff. To determine the core issue, the court had considered to following sub-issues: (a) whether the signatures of the plaintiff in the second set of agreements were forged; (b) whether the plaintiff approbating and reprobating or blowing hot and cold — this issue was in relation to the inconsistent position taken by the plaintiff whereby he wanted the second set of SPAs to be declared invalid but he enjoyed and still was enjoying the financing obtained from the Bank of China (‘BOC’) premised upon the second set of SPAs and the BOC was not a party to the two suits before the court; (c) whether the plaintiff could challenge the second set of agreements; and (d) whether fraud had been proved.

**Held**, dismissing the two suits with costs of RM40,000 subject to allocatur per suit to be paid by the plaintiff to the defendant in each suit:

- F (1) Based on the evidence and after inspecting the impugned signatures pursuant to s 73(1) of the Evidence Act 1950 (‘the EA’), the court agreed with the defendant that the signatures on the second set of agreements were that of the plaintiff. Nonetheless, this did not dispose of the two suits. This was because the plaintiff posited an alternative cause of action grounded on fraud premised upon the transactional solicitor having placed or ‘swapped’ documents carrying the plaintiff’s genuine signatures to be placed in the second set of agreements, back-dating them and passing them off as having been agreed upon by the plaintiff, when the plaintiff did not (see paras 20–21 & 23).
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- H (2) With the plaintiff having and continuing to act on the premise that he had paid for the two lots in full using the financing obtained from the BOC which were drawn up with reliance placed upon the second set of SPAs, and with both parties further confirming that only one letter of offer for each of the two lots were relied upon, the plaintiff must be taken to have utilised the financing for the second set of agreements. Therefore, there was a glaring inconsistent position being taken by the plaintiff in that he enjoyed and was still enjoying the financing obtained premised upon the second set of SPAs but wanted them to be declared
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invalid, but BOC was not a party to the two suits before the court. The court was aware of O 15 r 6(1) of the Rules of Court 2012, but it was also settled law that all parties affected by a court order must be made parties to the suit. Further, the court found that the plaintiff was blowing hot and cold in continuing to enjoy financing from BOC which were drawn up with reliance placed upon the second set of SPAs but wanting to have them declared unlawful (see paras 26–28 & 57).

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- (3) The second set of SPAs were ones required by the Housing Development (Control and Licensing) Regulations 1989 to be reduced into the form of a prescribed format, and therefore no evidence shall be admitted for the purpose of contradicting its terms (see s 92 of the EA). However, with the plaintiff challenging the second set of agreements, including the second set of SPAs, on grounds of fraud and that they were backdated to perpetrate a fraud upon him, evidence to prove the same could be admitted pursuant to the proviso in s 92(a) of the EA. The legal burden was on the plaintiff to prove his allegation that the second set of agreements were brought about fraudulently (see paras 29–34).

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- (4) The court had said that the plaintiff had ostensibly utilised the second set of SPAs because: (a) DW1, the solicitor who was acting for the defendant, was also the transactional solicitor for the financing; (b) the two certificates containing the plaintiff's acknowledgment that DW1's legal firm was not acting for the plaintiff as the purchaser, were not signed before a Commissioner for Oaths and by reason of s 84(2) of the Legal Profession Act 1976 ('the LPA'), they were not valid. Instead, pursuant to s 84(1) of the LPA, a statutory obligation was cast upon DW1 who was acting for the defendant, a developer to ensure that any SPA drawn up by her was scrutinised by an advocate and solicitor. This was not done. The seriousness in which this obligation had to be met, could be seen in s 84(6) of the LPA where the defaulting advocate and solicitor may be liable to disciplinary proceedings. If the provisions of s 84(1) of the LPA had been scrupulously followed, it was probable that the two suits before the court would not be in the court's docket; and (c) the counsels for both parties had confirmed that there was only one letter of offer by BOC per lot, and the loan documentation provided that it was the second set of SPAs that formed the security for the financing given by BOC and which was being enjoyed by the plaintiff (see para 41).

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- (5) The court found the answer given by the DW2 was probable ie, having found that the plaintiff was the only person who had bought two units in that development, it was not commercially viable for the defendant to proceed with the development as a stratified development with the plaintiff ending up as being the only person to bear all the maintenance charges for the common property and facilities of this development, as

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A provided under the Strata Management Act 2013. This led to discussions said to be conducted by Mr Ye LangHeng on behalf of the defendant, and which resulted in the plaintiff agreeing for the development to be converted from a stratified one to one with individual titles. This agreement was documented in a letter. This letter was put to the plaintiff who agreed that it carried his signature and thus, the inference was that he had agreed to it (see paras 46–47).

(6) In due course, the defendant did complete the construction of the houses, built the swimming pool in Lot 207, had the titles converted on 9 March 2016 and vacant possession of the houses were delivered to the plaintiff. That the plaintiff refused to accept the same did not detract from the fact that the defendant did perform its end of the bargain (see para 50).

D **[Bahasa Malaysia summary]**

Plaintif telah membeli daripada defendan tiga unit hartanah melalui tiga set perjanjian jual beli ('set PJB pertama') dalam format Jadual H yang ditetapkan oleh Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Masalah timbul apabila defendan menyerahkan dua daripada hartanah tersebut ('Lot 197' dan 'Lot 207') kepada plaintiff dengan hakmilik individu dan bukannya dengan hakmilik strata. Dalam hal ini, memandangkan hanya plaintiff telah membeli dua unit hartanah untuk fasa pembangunan tersebut, defendan bimbang ia tidak akan berdaya maju secara komersial untuk kedua-dua pihak kerana plaintiff akan menjadi satu-satunya yang akan menanggung kos untuk penyelenggaraan dan pengurusan semua harta bersama dan kemudahan bersama. Berikutan perbincangan antara bekas pengarah defendan, Encik Yee LangHeng dan plaintiff, pihak-pihak telah menandatangani surat ikatan pembatalan untuk membatalkan set PJB pertama dan memasuki set PJB kedua dalam format Jadual H yang diundurkan tarikh pada 30 Ogos 2014 (secara kolektif dirujuk sebagai 'set perjanjian kedua'). Berkenaan set perjanjian kedua, plaintiff menegaskan bahawa semasa dia menandatangani dokumen-dokumen untuk pertukaran nama bagi unit ketiga hartanah ('Lot 320') yang tidak dipertikaikan, dia telah diminta menandatangani banyak dokumen kosong yang digunakan oleh defendan untuk membuat set perjanjian kedua untuk menipunya. Plaintiff kemudiannya membawa dua tindakan terhadap defendan untuk mendapatkan, antara lain, pengisytiharan bahawa set perjanjian kedua adalah tidak sah dan untuk perintah pelaksanaan spesifik bagi set PJB pertama. Isu terasnya ialah sama ada set perjanjian kedua adalah sah dan mengikat plaintiff. Untuk menentukan isu teras tersebut, mahkamah telah mempertimbangkan isu-isu sampingan berikut: (a) sama ada tandatangan plaintiff dalam set perjanjian kedua telah dipalsukan; (b) sama ada plaintiff 'approbating and reprobating' atau 'blowing hot and cold' — isu ini adalah berkaitan dengan pendirian yang tidak konsisten yang diambil oleh plaintiff di mana dia mahu set PJB kedua

diisytiharkan tidak sah tetapi dia telah menikmati dan masih menikmati pembiayaan yang diperolehi daripada Bank of China ('BOC') yang didapati dengan menggunakan set PJB kedua dan BOC bukanlah pihak kepada kedua-dua saman di hadapan mahkamah; (c) sama ada plaintif boleh mencabar set perjanjian kedua; dan (d) sama ada fraud telah dibuktikan.

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**Diputuskan** menolak kedua-dua saman dengan kos RM40,000 tertakluk kepada alokatur bagi setiap saman, yang perlu dibayar oleh plaintif kepada defendan dalam setiap saman:

- (1) Berdasarkan keterangan dan selepas memeriksa tandatangan yang dipertikaikan menurut s 73(1) Akta Keterangan 1950 ('AK'), mahkamah bersetuju dengan defendan bahawa tandatangan pada set perjanjian kedua adalah tandatangan plaintif. Walau bagaimanapun, ini tidak melupuskan kedua-dua saman tersebut. Ini kerana plaintif telah mengemukakan kausa tindakan alternatif berdasarkan fraud atas alasan bahawa peguam urus niaga telah meletakkan atau 'menukar' dokumen yang membawa tandatangan tulen plaintif untuk diletakkan dalam set perjanjian kedua, mengundurkan tarikhnya dan menyatakan bahawa ia telah dipersetujui oleh plaintif sedangkan plaintif tidak menyetujuinya (lihat perenggan 20–21 & 23).
- (2) Dengan plaintif telah dan terus bertindak atas premis bahawa dia telah membayar sepenuhnya bagi kedua-dua lot tersebut menggunakan pembiayaan yang diperolehi daripada BOC yang telah disediakan dengan pergantungan diletakkan pada set PJB kedua, dan dengan kedua-dua pihak mengesahkan selanjutnya bahawa hanya terdapat satu surat tawaran bagi setiap satu daripada dua lot yang dirujuk, plaintif mesti dianggap telah menggunakan pembiayaan untuk set perjanjian kedua. Oleh itu, terdapat kedudukan tidak konsisten yang jelas diambil oleh plaintif kerana dia telah menikmati dan masih menikmati pembiayaan yang diperolehi berdasarkan set PJB kedua tetapi mahu ia diisytiharkan tidak sah, tetapi BOC bukan pihak kepada kedua-dua saman di hadapan mahkamah. Mahkamah sedar tentang A 15 k 6(1) Kaedah-Kaedah Mahkamah 2012, tetapi ia juga merupakan undang-undang yang mantap bahawa semua pihak yang terjejas oleh perintah mahkamah mesti dijadikan pihak-pihak dalam saman. Selanjutnya, mahkamah mendapati bahawa plaintif telah 'blowing hot and cold' dalam terus menikmati pembiayaan daripada BOC yang disediakan dengan pergantungan kepada set PJB kedua tetapi mahu ia diisytiharkan sebagai tidak sah (lihat perenggan 26–28 & 57).
- (3) Set PJB kedua adalah yang dikehendaki oleh Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 untuk dibuat ke dalam bentuk format yang ditetapkan, dan oleh itu tiada keterangan boleh diterima bagi tujuan menyangkal terma-termannya (lihat s 92 AK).

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- A Walau bagaimanapun, dengan plaintif mencabar set perjanjian kedua, termasuk set PJB kedua, atas alasan fraud dan bahawa tarikh perjanjian-perjanjian tersebut telah diundurkan untuk melakukan fraud ke atasnya, keterangan untuk membuktikan perkara tersebut boleh diterima menurut proviso dalam s 92(a) AK. Beban undang-undang
- B terletak pada plaintif untuk membuktikan dakwaannya bahawa set perjanjian kedua tersebut dibuat secara fraud (lihat perenggan 29–34).
- (4) Mahkamah telah mengatakan bahawa plaintif pada zahirnya telah memanfaatkan set PJB kedua kerana: (a) DW1, peguam cara yang bertindak untuk defendan, juga merupakan peguam cara transaksi untuk pembiayaan; (b) dua perakuan yang mengandungi pengakuan
- C plaintif bahawa firma guaman DW1 tidak bertindak untuk plaintif sebagai pembeli, tidak ditandatangani di hadapan Pesuruhjaya Sumpah dan disebabkan oleh s 84(2) Akta Profesion Undang-undang 1976 ('APUU'), kedua-dua perakuan tersebut tidak sah. Sebaliknya, menurut
- D s 84(1) APUU, tanggungjawab statutori telah dikenakan ke atas DW1 yang bertindak untuk defendan, pemaju untuk memastikan bahawa mana-mana PJB yang disediakan olehnya diteliti oleh peguam bela dan peguam cara. Ini tidak dilakukan. Keseriusan di mana kewajipan ini
- E perlu dipenuhi, boleh dilihat dalam s 84(6) APUU di mana peguam bela dan peguam cara yang ingkar mungkin boleh dikenakan prosiding tatatertib. Jika peruntukan s 84(1) APUU telah dipatuhi dengan teliti, ada kemungkinan bahawa kedua-dua saman di hadapan mahkamah ini
- F tidak akan berada dalam doket mahkamah; dan (c) peguam-peguam bagi kedua-dua pihak telah mengesahkan bahawa hanya terdapat satu surat tawaran oleh BOC bagi setiap lot, dan dokumentasi pinjaman menyatakan bahawa set PJB kedua yang membentuk jaminan untuk pembiayaan yang diberikan oleh BOC dan yang dinikmati oleh plaintif (lihat perenggan 41).
- G (5) Mahkamah mendapati jawapan yang diberikan oleh DW2 adalah berkemungkinan iaitu, setelah mendapati plaintif adalah satu-satunya orang yang telah membeli dua unit dalam pembangunan tersebut, defendan mendapati bahawa adalah tidak berdaya maju secara komersial untuk defendan meneruskan pembangunan tersebut sebagai
- H pembangunan berstrata dengan plaintif berakhir sebagai satu-satunya orang yang menanggung semua caj penyelenggaraan untuk harta bersama dan kemudahan bersama bagi pembangunan ini, seperti yang diperuntukkan di bawah Akta Pengurusan Strata 2013. Ini membawa kepada perbincangan yang dikatakan telah dijalankan oleh Encik Ye
- I LangHeng bagi pihak defendan, dan yang menyebabkan plaintif bersetuju untuk pembangunan tersebut ditukar daripada pembangunan berstrata kepada pembangunan dengan hakmilik individu. Perjanjian ini telah didokumenkan dalam satu surat. Surat ini telah dikemukakan kepada plaintif yang bersetuju bahawa ia membawa tandatangannya

dan dengan itu, inferensnya adalah bahawa dia telah bersetuju dengannya (lihat perenggan 46–47). A

- (6) Pada masa yang sewajarnya, defendan telah menyiapkan pembinaan rumah-rumah, membina kolam renang di Lot 207, telah menukar hakmilik pada 9 Mac 2016 dan pemilikan kosong rumah-rumah telah pun diserahkan kepada plaintif. Fakta bahawa plaintif enggan menerimanya tidak menghapuskan hakikat bahawa defendan telah pun melaksanakan tanggungjawabnya (lihat perenggan 50).] B

#### Cases referred to C

*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (refd)

*Lee Loy & Ors v Poh Kam Sang & Anor* [2018] 3 MLJ 240; [2017] 1 LNS 2023, CA (refd)

*Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd) D

*Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd & Ors* [2022] MLJU 2007; [2022] CLJU 1942, HC (refd)

*Saujana Resort (M) Bhd v Chin Cheen Foh & Ors and another appeal* [2021] 3 MLJ 873; [2021] 3 CLJ 71, CA (refd) E

*UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor* [2021] 3 MLJ 107; [2021] 5 CLJ 193, CA (refd)

#### Legislation referred to F

Evidence Act 1950 ss 61, 66, 73(1), 73A, 92, 92(a), 101, 114(g)

Housing Development (Control and Licensing) Regulations 1989 Schedule H

Legal Profession Act 1976 s 84, 84(1), (2), 84(6), s 94(2)

Rules of Court 2012 O 15 r 6(1), O 34 r 2(2)(e)(i), 2(2)(e)(ii)

Strata Management Act 2013

*Wong Xin Yan (David Gurupatham & Koay) for the plaintiff.*

*John Aloysius Skekchy (with Ban Qiao Hui) (James Monteiro) for the defendant.* H

#### Su Tiang Joo J:

It behoves an advocate and solicitor acting for a housing developer to ensure that any certificate signed by a purchaser saying he does not intend to engage an advocate and solicitor to scrutinise the agreement for him is signed by the purchaser in the presence of a commissioner for oaths who is not an advocate and solicitor practising in partnership with, or as the employee of, the advocate and solicitor acting for the housing developer. I

**A** INTRODUCTION

[1] This is the grounds of judgment for two actions commenced by the plaintiff which were heard together, and dismissed with costs after a full trial. Each action is premised upon the plaintiff seeking specific performance of a sale and purchase agreement wherein he had purchased what was to be a unit of stratified property to be managed under the Strata Management Act 2013 but was instead delivered a unit of property with an individual title.

**C** SALIENT FACTS

[2] The plaintiff bought three units of property pursuant to three sets of SPAs (collectively referred to as the 'first set of SPAs') in the Schedule H format prescribed by the Housing Development (Control and Licensing) Regulations 1989 all dated 23 April 2014, and which were to come with strata titles. For the two units under dispute, one unit of housing accommodation was to be as per design model G192 for Lot 207 and the other as per design model G202 for Lot 197.

[3] As it turned out, the defendant delivered the two units of property under dispute which are Lots 197 and 207 ('the two lots') to the plaintiff with individual titles instead of with strata titles (agreed fact).

[4] The defendant, asserted, inter alia, that this is because it was only the plaintiff who had purchased the two units of properties for that particular phase of its development (see evidence-in-chief of DW2 in DWS-2 para 23 encl 104). DW2 is the Regional Head of Sales and Marketing Department of Country Garden Malaysia and Singapore.

[5] DW2 testified (in para 23 of DWS-2) that the defendant's management was concerned that it would not be commercially viable for both the plaintiff and the defendant if this phase, which is to house the two lots, were to be delivered with common facilities and service. In the case of the plaintiff, it would lead to the plaintiff ending up being the only person to bear the costs for the maintenance and management of all the common property and common facilities. Evidence in one of the documents made mention that the maintenance of the proposed common swimming pool alone could have come up to RM60,000 per month.

[6] The defendant further asserted that following discussions by its former Deputy Director of Sales and Marketing Department, one Mr Ye LangHeng, with the plaintiff, the plaintiff had with full knowledge, agreed and executed, inter alia, deeds of revocation to revoke the first set of SPAs and entered into a second set of sale and purchase agreements ('second set of SPAs') in Schedule G

format and which were backdated to 30 August 2014 for the two lots, (collectively referred to as the 'second set of agreements') before the transactional solicitor, DW1. Reliance was placed upon a letter from the defendant to the plaintiff (IDB 1 p 143 in Mandarin with an English version translated by a court interpreter (IDB10 p 3).

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[7] A third unit, which is not under dispute, purchased by the plaintiff is Lot 320 which is under a different phase of the development. The SPA for Lot 320 was put under the name of the plaintiff's nominee and transacted under the prescribed statutory Schedule H form. However, when the plaintiff had the name of his nominee transaction changed to his name, it was done at the same time as the alleged execution of the second set of agreements for the two lots. The plaintiff asserted that in the course of him executing documents for the change in name for Lot 320, he was made to sign many blank documents which, as will be mentioned later, formed his platform for his alternative cause of action that these documents were used to make up the second set of agreements to defraud him.

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[8] In the financial documents to finance the purchase of the two lots, the second set of SPAs were named as the security with the plaintiff assigning his rights under the two lots to Bank of China (M) Bhd ('BOC') together with the plaintiff giving a power of attorney over the two lots to BOC.

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[9] The two titles to the land for the two lots were in due course converted into individual landed titles with houses constructed thereon, and with a private swimming pool constructed on Lot 207 at the defendant's costs.

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[10] The defendant asserted that vacant possession of the houses were delivered to the plaintiff under cover of letter dated 1 August 2017. This is disputed by the plaintiff who asserted he refused to accept delivery of vacant possession because the properties sought to be delivered did not come with strata titles with common property and common facilities to be managed under the Strata Management Act 2013.

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#### THE PLAINTIFFS CLAIMS

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[11] The plaintiff claims he was defrauded.

[12] By purchasing a property in a stratified development, he would inter alia, enjoy common property and facilities, and would have the right to on-sell any of the properties to foreign citizens or permanent residents or foreign companies. The plaintiff would not be able to do so with landed properties carrying individual titles. The plaintiff referred to and relied upon the provisions of the Circular of the Director General Land and Mines No 1/2014,

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**A** and in particular, para 3.2.1 issued by the Selangor State Government which allows properties to be sold to foreign citizens or permanent residents which have a minimum value of RM2m for properties in zones 1 and 2 and RM1m for properties in zone 3. However, these properties are limited to those which are stratified. These provisions came into force on 1 September 2014 ie only two days after the second set of SPAs were dated ie 30 August 2014. The provisions state:

3.2 Syarat-Syarat Permohonan

**C** 3.2.1 Kategori tanah yang dibenarkan berdasarkan Syarat Nyata Tanah adalah seperti berikut:

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- i. Bangunan Kediaman
    - Paras harga minima adalah M2,000,000.00 bagi hartanah di Zon 1 dan 2 serta RM1,000,000.00 bagi hartanah di Zon 3.
    - Hartanah adalah terhad pada jenis Strata termasuk ‘Landed Strata’ sahaja.
  - ii. Bangunan perniagaan
    - Paras harga minima RM3,000,000.00 bagi hartanah di Zon 1, 2 dan 3.
  - iii. Industri/Perusahaan
    - Paras harga minima RM3,000,000.00 bagi hartanah di Zon 1, 2 dan 3.
    - Hartanah yang mempunyai Sekatan Kepentingan Sahaja perlu mendapat kelulusan daripada Pihak Berkuasa Negeri.
    - Penerima hendaklah mempunyai Lesen Pengilang daripada Kementerian Perdagangan Antarabangsa dan Industri (MITI) bagi Syarikat perkilangan milik asing.

**F** [13] The plaintiff brought two actions against the defendant. One is WA-22NCVC-255–04 of 2019 (‘Suit 255’ for Lot 207) and another is WA-22NCVC-259–04 of 2019 (‘Suit 259’ for Lot 197) both collectively referred to as the ‘two suits’

**G** [14] The plaintiff seeks a declaration that the second set of agreements are invalid, for an order of specific performance of the first set of SPAs, damages to be assessed in lieu of specific performance, special damages made up largely of the statutory prescribed liquidated damages for late delivery of the two lots computed based upon the first set of SPAs, costs on a solicitor-client basis and such further or other reliefs as this honourable court may deem fit or just.

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[15] Due to the commonality of issues, the two suits were heard together and this decision is for the two suits.

**I** THE PLAINTIFF’S GROUNDS FOR HIS CLAIMS

[16] The plaintiff pleaded (in E108 pp 42–45) and asserted (witness statement in E87 marked as PWS-1) that:

- (a) he had no knowledge of the second set of SPAs (para 26); A
- (b) the second set of agreements are false documents;
- (c) with him being in China at the material time of August 2014, it was impossible for him to have executed the second set of agreements which were dated 30 August 2014. He only came to know of the second set of agreements on or around 29 November 2017; B
- (d) the defendant had forged his signatures in the second set of agreements. The plaintiff was categorical that he had never signed them; C
- (e) alternatively, even if the signatures on the second set of agreements are his, the plaintiff asserted that he ought not to be bound by them. He asserted that the second set of agreements were reconstructed with the defendant swapping pages of documents he had signed as part of a fraud upon him to convert his purchase under a Schedule H format to that under a Schedule G format. He asserted this came about when upon his return from China to Malaysia, he had visited the transactional solicitor (DW1) on 13 November 2015 to have the name of the purchaser in the SPA transaction for Lot 320 changed from his nominee's name to his name. Whilst there, he said he was made to sign many documents which were blank documents which he alleged were then used to reconstruct the second set of agreements. I observed that Lot 320 was a stratified parcel purchased using the prescribed Schedule H format which did not give rise to any dispute save that this transaction was mentioned to give context to the plaintiff's claims. D E F
- (f) the plaintiff pointed out that it was impossible for the Second SPAs under the Schedule G format to be dated 30 August 2014 because the approval for the amended planning permission for the units of property in landed title form came about two years after the second set of agreements were said to be executed; G
- (g) to underscore his assertion, the plaintiff said he had secured approval from his financier, BOC, for the two lots on 23 July 2015 (PWS-1; E87) which was before he was made to sign many of the alleged documents in blank on 13 November 2015. This financing was for the first set of SPAs; and H
- (h) upon query by this court for clarification, both the plaintiff and the defendant could only point to one letter of offer each from BOC which is both dated 23 July 2015 (IDB 1 encl 45 pp 127 and 263 in Suit 255 and replicated for Suit 259 for Lot 207) to finance the purchase of the two lots. I

**A** CORE ISSUE

[17] The core issue is whether the second set of agreements are valid and binding on the plaintiff, as the defendant asserted that if they are so, the plaintiff's two suits would fail. If they came about by a fraud perpetrated upon the plaintiff, they ought to be declared invalid.

**B**

## PARTIES' SUBMISSIONS

**C**

[18] Comprehensive written primary submissions and submissions in reply were put up by learned counsel for both the plaintiff and the defendant for the two suits. This was supplemented with closing oral submissions presented on 26 January 2024. I acknowledge the valiant efforts which I am sure were done with the undoubted helpful contributions made by their able learned juniors and which have assisted me in my deliberations.

**D**

## COURT ANALYSIS AND DECISION

**E**

[19] In determining the core issue, the following is my decision on the following sub-issues.

*Whether the signatures of the plaintiff in the second set of agreements are forged*

**F**

[20] From the evidence led, including I inspecting the impugned signatures pursuant to s 73(1) of the Evidence Act 1950 ('the EA'), which provides that:

**G**

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

**H**

[21] I agree with the defendant that the signatures on the second set of agreements are that of the plaintiff. See *Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd & Ors* [2022] MLJU 2007; [2022] CLJU 1942 (HC) paras [23]–[24] where the learned judicial commissioner accepted the invitation of the defendant to inspect the impugned signatures pursuant to s 73(1) of the EA. His Lordship said:

**I**

[23] I acceded to the invitation of learned counsel for D1 to examine the signatures of Lee Nyan Chong appearing in the memoranda of transfers and the affidavits accepted by D1 to have been affirmed by Lee Nyan Chong. This, I can do premised upon the provisions of s 73(1) of the Evidence Act 1950 which provides that:

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal,

admitted or proved to the satisfaction of the court to have been written or made by that person, may be comparee! by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

A

[24] In *Siauw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349; [2008] 5 CLJ 441 the Court of Appeal held at paras 6–7:

B

[6] But in this case you do not have to be an expert to see for yourself that the signature supposed to be of the plaintiff appearing on the memorandum of transfer and the assignment do not match even upon a cursory visual examination. In fact, the signature said to be that of the plaintiff on the assignment is manifestly different from that appearing on the memorandum of transfer ...

C

[7] Had the judge undertaken such an examination he would have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries ...

D

[22] In *Loke Kooi Chuan Properties Sdn Bhd* after undertaking a comparison, the learned judicial commissioner went on to make a finding that the signatures were similar.

E

[23] Although I have found that the signatures on the second set of agreements are genuine signatures of the plaintiff's, this does not dispose of Suit 255 and Suit 259. This is because as mentioned, the plaintiff posited an alternative cause of action grounded on fraud premised upon the transactional solicitor having placed or to use learned counsel's word, 'swapped' documents carrying the plaintiff's genuine signatures to be placed in the second set of agreements, back-dating them and passing them off as having been agreed upon by the plaintiff, when the plaintiff did not.

F

G

*Approbating and reprobating or blowing hot and cold*

[24] In dealing with this alternative ground advanced by the plaintiff to challenge the validity of the second set of agreements, there is one issue which troubled me. It is that the plaintiff had in fact relied upon the alleged false Second SPAs for the two lots as security to obtain credit facilities from BOC (see the facilities documentation (encl 45 pp 50–83 at p 80 for Suit 255 and pp 186–219 at p 216 for Suit 259)).

H

[25] As at the date of the presentation of closing oral submissions on 26 January 2024, no application was made to have BOC added as a party to the two suits to address the consequences in the event the second set of agreements are declared invalid.

I

A [26] With the plaintiff having and continuing to act on the premise that he  
had paid for the two lots in full using the financing obtained from BOC which  
were drawn up with reliance placed upon the second set of SPAs, and with both  
B parties further confirming that only one letter of offer dated 23 July 2015 for  
each of the two lots were relied upon, the plaintiff must be taken to have  
utilised the financing for the second set of agreements. Therefore, there is a  
glaring inconsistent position being taken by the plaintiff in that he enjoyed and  
is still enjoying the financing obtained premised upon the second set of SPAs  
but wants them declared invalid, but BOC is not a party to the two suits before  
C this court. I had pointed this out to the learned counsel for the plaintiff and the  
defendant on 26 January 2024 during the course of them presenting their oral  
submissions. Is the plaintiff blowing hot and cold or approbating and  
reprobating? If so, it is a position which the court would not countenance. See  
D *Lee Loy & Ors v Poh Kam Sang & Anor* [2018] 3 MLJ 240; [2017] 1 LNS 2023  
(CA) at para [39] that held:

[39] We further agree with the submissions of learned counsel for the respondents  
that it is clear that the appellants are approbating and reprobating at the same time.  
While on the one hand the appellants are resisting the summary application and  
contesting that they are more than squatters who have a right to stay, they are on the  
E other hand, applying to the court to compel the respondents to sell the subject land  
or be given time to move. In *Cheah Theam Kheang v City Centre Sdn Bhd (in  
liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal explained the  
principle of approbation and reprobation:

[105] We categorically say that the liquidator cannot blow hot and cold to suit him  
whenever he feels like it. He cannot approbate and reprobate in the same breath. On  
the one hand, he claims that the High Court order dated 16 July 2001 overrides or  
displaces a statute which render the said order invalid and yet he has the audacity to  
continue to act as a liquidator by virtue of the said order. In the words of *Sir Nicolas  
Browne-Wilkinson VC in Express Newspapers Plc v News (UK) Ltd and Others* [1990]  
G 3 All ER 376 at pp 383–384:

There is a principle of law of general application that it is not possible to  
approbate and reprobate. That means you are not allowed to blow hot and cold  
in the attitude that you adopt. A man cannot adopt two inconsistent attitude  
towards another: he must elect between them and, having elected to adopt one  
H stance, cannot thereafter be permitted to go back and adopt an inconsistent  
stance.

[27] This inconsistent stand by the plaintiff sits heavily on my mind. I am  
aware that O 15 r 6(1) Rules of Court 2012 ('the ROC'), expressly provides  
I that:

(1) A cause or matter shall not be defeated by reason of the misjoinder or  
non-joinder of any party, and the Court may in any cause or matter determine the  
issues or questions in dispute so far as they affect the rights and interests of the  
persons who are parties to the cause or matter.

[28] However, it is also settled that all parties affected by a court order must be made parties to the suit, see *Saujana Resort (M) Bhd v Chin Cheen Foh & Ors and another appeal* [2021] 3 MLJ 873; [2021] 3 CLJ 71 (CA) at para [41] where the Court of Appeal held that:

It is trite that in an application for a declaration, all parties who would potentially be affected by such an order must be before the court.

*Whether the plaintiff can challenge the second set of agreements*

[29] The Second SPAs are ones required by the Housing Development (Control and Licensing) Regulations 1989 to be reduced into the form of a prescribed format, and therefore no evidence shall be admitted for the purpose of contradicting its terms, see s 92 of the EA which states:

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

[30] However, there is a proviso in s 92(a) of the EA which provides, inter alia that any fact may be proved which would invalidate any document such as fraud or that it is wrongly dated. Section 92(a) is reproduced below:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

[31] Wherefore, with the plaintiff challenging the second set of agreements, including the second set of SPAs, on grounds of fraud and that they were back-dated to perpetrate a fraud upon him, evidence to prove the same can be admitted.

*Whether fraud has been proved*

Burden of proof

[32] In the two suits, the plaintiff asserts that the second set of agreements are false documents. He seeks a declaration that the second set of agreements are invalid instruments. It is trite that he who asserts must prove, see s 101 of the EA which provides:

A (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

B (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

C [33] Therefore, the burden clearly lies on the plaintiff. In this regard, the reliance by the plaintiff on the case of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 (FC) for the principle that the burden and onus to prove that a sale is genuine is on the pursuer, that is, the party who asserts that the sale is genuine, is *wholly misplaced* because in *Letchumanan*, it was the plaintiff who was asserting that the sale is genuine. See para [62]:

D ... The respondent had the burden to prove that Kalidas had authority to bind the appellants (see *Ardeshir Mama v Floora Sassoon* AIR 1928 PC 208). It was not where judgment could be entered upon failure of the defence. For even if it were true that forgery was not proved, it remained that it must be first proved that the impugned PA was valid in order for judgment to be entered. The burden of proving that the SPA was binding rested with the pursuer (see *Ardeshir v Flora Sassoon* AIR 1928 PC 208 at 215). If the impugned PA were not valid, then the SPA could not bind the first appellant, that is, even if forgery were not proved.

F [34] In the two suits before this court, it is the plaintiff who is asserting that the second set of agreements were brought about fraudulently, and therefore it is clear that the legal burden lies upon him to prove his assertion and not the defendant. Whilst evidential burdens may shift, the legal burden that lies upon the plaintiff does not shift. See *UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor* [2021] 3 MLJ 107; [2021] 5 CLJ 193 (CA) at para [63] where the Court of Appeal said:

G We consider it a well-established principle that a defendant is perfectly entitled to challenge the evidence of the plaintiff's expert witness by way of cross-examination without him having to call his own experts. In *Keruntum Sdn Bhd v The Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676 at p 698, Hasan Lah FCJ (speaking for the Federal Court) said:

H [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of these different methods. See *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147.

I

[35] The second set of agreements are found in the first common bundle of documents (IDB1 encl 44) and were classified as Part C documents (see IDB3 (see NOP p 4 with the documents being in encl 44 for Suit 255 and in encl 42 for Suit 259). The consequence of the parties classifying them as Part C documents meant that the documents are disputed as to both authenticity and contents, see O 34 r 2(2)(e)(ii) of the ROC:

(e) if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:

- (i) Part B — documents where the authenticity is not disputed but the contents are disputed;
- (ii) Part C — documents where the authenticity and contents are disputed.

[36] If a document is disputed as to its authenticity, the document will have to be first admitted and the burden lies upon the party who wishes to assert that it is authentic by having the same tendered and its maker called, (see s 73A of the EA) or to satisfy the court as to why secondary evidence of the same can be relied upon to have the same admitted. Section 73A of the EA is reproduced here:

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

- (a) if the maker of the statement either —
  - (i) had personal knowledge of the matters dealt with by the statement; or
  - (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
- (b) if the maker of the statement is called as a witness in the proceedings.

[37] During the course of trial, the second set of agreements were referred to by DW1, who was the transactional solicitor, in her evidence-in-chief given in the form of a witness statement (encl 101 para 2.1 c), 8, Lot 207 — para 9(b) and 9(c); Lot 197—para 9(b) and (c), para 11.7). In summary, she said that she had met the plaintiff at her office on *13 November 2015*, she explained the contents of the second set of agreements to the plaintiff who proceeded to sign them and she then affixed her signature on the same to confirm having witnessed the plaintiff executing them. DW1 then went on to say that:

A I also passed an Acknowledgment confirming that he executed the inter alia, aforementioned documents.

B [38] DW1 then produced a copy of the acknowledgment by the plaintiff dated 13 November 2015 (marked as exh DLB6 in encl 101) which was later filed as an additional common BOD (encl 107 marked as IDB10) classified as Part B documents, which meant that their authenticity is not disputed but the contents are disputed, see O 34 r 2(2)(e)(i) of the ROC. DW1 was cross-examined on it (see NOP p 141 lines 25 to 4 and p 142 lines 1 to 3746 and p 143 line 1). In summary, DW1 says that the word in the manuscript saying ‘Collected’ meant her firm *collected* the first set of SPAs from the plaintiff after he had executed the second set of agreements.

D [39] On the Part C documents which were the second set of agreements, learned counsel for the defendant ought to have the authenticity of the disputed documents separately proved, admitted and marked as exhibits, especially the second set of agreements relied upon by them in their defence, with their originals produced and maker called, as is required by s 73A of the EA. This was not done, and they remained as Part C documents. Even though, throughout the course of trial, they have been referred to in detail, and identified by both learned counsel, unless and until they have been properly admitted in accordance with the evidential requirements, they remained as identified documents (ID), and generally their contents ought to be inadmissible.

F [40] However, I am prepared to admit them, in particular, the second set of SPAs and the deed of revocation for the two lots for the following reasons:

- G (a) during cross-examination of the plaintiff, he admitted that the signature on the document entitled acknowledgment (exh DL6 IDB 10 p 22) saying that the signatures on the second set of agreements ‘should be’ his (NOP p 37 line 8);
- H (b) as mentioned, my perusal of the disputed signatures pursuant to s 73(1) of the EA led me to find that the signatures on the second set of SPAs are those of the plaintiff and thus subject to what I have to say below, the maker of the document has been produced in court;
- I (c) there is documentary evidence in the form of two separate facilities agreement (IDB 5; encl 45 at p 127 for Lot 207 and p 220 for Lot 107) that show that the plaintiff had *ostensibly* utilised the second set of SPAs dated 30 August 2014 for purposes of securing facilities from the BOC (see IDB4 E45). The inference is that the originals would have been handed over to his financier as is common conveyancing practice, more so, when one of the security document is a Deed of Assignment of the alleged rights of the plaintiff in the SPA of 30 August 2014. Therefore,

- secondary evidence of the second set of SPAs can be led to prove them; **A**
- (d) secondary evidence was in fact led. This is in the form of the photocopies produced in IDB3 (encl 44), and the oral account of their contents given by the transactional solicitor, DW1, who has herself drawn them up and seen them, see ss 61, 63(b) and (e) 65(1)(a)(i) of the EA, which is produced as follows: **B**
- Section 61: The contents of documents may be proved either by primary or by secondary evidence.
- ...
- Section 63(b): Secondary evidence includes — **C**
- ...
- (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies; **D**
- Section 65(1)(a)(i):
- (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases: **E**
- (a) when the original is shown or appears to be in the possession or power
- (i) of the person against whom the document is sought to be proved’;
- (e) in my considered opinion, there is no necessity for a notice to be given to the plaintiff to produce the same as he ought to know that from the nature of the two suits filed by him, he will be required to produce it with him having relied upon them to secure financing, see proviso (b) of s 66 of the EA: **F**
- Secondary evidence of the contents of the documents referred to in section 65(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case: **G**
- Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases or in any other case in which the court thinks fit to dispense with it: **H**
- ...
- (b) when from the nature of the case the adverse party must know that he will be required to produce it; ... **I**

[41] I had said that the plaintiff had ostensibly utilised the second set of SPAs because:

- A (a) from the facilities agreement, DW1 was also the transactional solicitor for the financing. This is borne out by her attesting the signature of the plaintiff as the borrower in the facilities agreements; she had also attested the signature of the plaintiff as the assignor in the assignment agreement, and attested the signature of the plaintiff as the donor of each of the power of attorney for the two lots, all of which documents were to document the loan taken and the security given;
- B
- C (b) I understood the plaintiff in his evidence-in-chief given in the form of his Witness Statement (PWS-1 at Q&A 20) as saying that the solicitor for the sale and purchase transaction and the loan transaction were the same, namely DW1, and he was not cross-examined on this and this supports the fact that DW1 was the transactional solicitor attending to the plaintiff in his financing transactions;
- D (c) DW1 referred to two certificates (IDB10 encl 107 pp 7 and 8) said to have been signed by the plaintiff, one for Lot 207 and the other for Lot 197. In these two certificates, the plaintiff has signed an acknowledgment that the law firm of Messrs Ajmer Sandhu & Ong, Advocates & Solicitors (now known as Messrs Kean Yau & Dang, see para 19 of DWS-2 encl 104) *is not acting* for him as the purchaser and that he consents to them preparing the SPA. DW1 is a partner of this law firm. These two Certificates carry a title as having been issued pursuant to s 84(1) of the Legal Profession Act 1976 ('the LPA'). However, s 84 of the LPA expressly provides that:
- E
- F (1) Where an advocate and solicitor acts for a housing developer in a sale of immovable property developed under a housing development neither he nor any member or assistant of the firm of which he is a member either as partner or employee shall in the same transaction act for the purchaser of that property, and a written agreement prepared by an advocate and solicitor or any member or assistant of the firm acting for the developer in respect of such transaction shall be scrutinised by an advocate and solicitor acting for the purchaser:
- G
- H *Provided that if any such written agreement in respect of the transaction is not scrutinised by an advocate and solicitor acting for the purchaser, the advocate and solicitor acting for the housing developer shall obtain a certificate signed by the purchaser showing that purchaser does not intend to engage an advocate and solicitor to scrutinise the agreement for him.*
- I (2) *For the purpose of this section a certificate shall not be valid unless it is signed by the Purchaser in the presence of a Commissioner for Oaths who is not an advocate and solicitor practising in partnership with, or as the employee of, the advocate and solicitor acting for the housing developer.*
- (d) a perusal of the two certificates relied upon by DW1 shows that they were not signed before a commissioner for oaths and by reason of s 84(2) of the LPA, they are not valid. Instead, pursuant to s 84(1) of the LPA,

- a statutory obligation is cast upon DW1 who is acting for the defendant, a developer to ensure that any SPA drawn up by her is scrutinised by an advocate and solicitor. This was not done. The seriousness in which this obligation has to be met, can be seen in s 84(6) of the LPA where the defaulting advocate and solicitor may be liable to disciplinary proceedings. If found guilty of misconduct, the advocate and solicitor shall be liable to one or more of the following penalties or punishments: (a) to be struck off the Roll; (b) to be suspended from practice for any period not exceeding five years; (c) to be ordered to pay a fine not exceeding fifty thousand Ringgit; or (d) to be reprimanded or censured, see s 94(2) of the LPA;
- (e) it cannot be gainsaid that if the provisions of s 84(1) of the LPA had been scrupulously followed, it is probable that the two suits now before this court would not be in the court's docket;
- (f) the answer elicited by learned counsel for the defendant when cross-examining the plaintiff that no one stopped him from getting his own lawyers (NOP p 56 lines 35 to 47) carries no value, and does little to countenance the clear contravention of the provisions housed in s 84(1) of the LPA. In fact, the plaintiff went to say that when the documents were passed to him, there were pages with a 'cross (x)' on them, and that when he was asked to sign at these places, he did. It is clear that he did not sign the s 84 certificate before a commissioner for oath as is statutorily required by s 84(2) of the LPA. Therefore, the perfunctory and careless attention in attending to this statutory requirement designed to safeguard the interest of the purchaser meant that the two certificates have no probative value. For the defendant to seek to justify such an omission by asserting that no one stopped the plaintiff from seeking the services of an advocate and solicitor is adding insult to injury, and aggravates the harm that may be suffered by the plaintiff and does little, if at all, to address the mischief or potential harm that this statutory provision seeks to avoid;
- (g) the plaintiff testified that his loan for Lots 207 and 197 was approved on 23 July 2015 (E87 PWS-1 Q&A 18 para 3). This piece of critical evidence is *corroborated* by the facilities agreement for Lot 207 at p 127 (IDB5) and for Lot 197 at p 263 (IDB5). Although the date at p 127 is rather blur, the date of '23 July 2015' can be clearly seen in p 263 (IDB5). With both transactions having indisputably taken place at the same time, I am of the considered view that BOC had approved the loans for the two lots on 23 July 2015. This was further confirmed by counsel for both the plaintiff and defendant that these two letters of offer each dated 23 July 2015 were the only letters of offer from BOC for the financing of the two lots; and

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- A (h) when learned counsel for the defendant cross-examined the plaintiff vigorously, and put to the plaintiff that the loans taken by the plaintiff must be for the Second SPAs of 30 August 2014 (see NOP 50–55), the plaintiff disagreed. However, his denial has no probative value because it is confirmed by learned counsel for both the plaintiff and defendant that
- B there is only one letter of offer by BOC per lot, and the loan documentation provides that it is the second set of SPAs that form the security for the financing given by BOC and which is being enjoyed by the plaintiff.
- C [42] As at 13 November 2015, when the plaintiff met with DW1 to execute the second set of agreements, the plaintiff asserted another critical event has taken place. The Selangor State Authority had issued a Circular (encl 46 pp 2–22) (‘the said Circular’) stating that with effect from 1 September 2014,
- D foreigners such as the plaintiff can only purchase stratified properties with a minimum value of RM1m. This meant that the plaintiff could not buy landed properties as they do not come with strata titles.
- E [43] Much time and effort was taken by the learned counsel for the plaintiff in both his written and oral submissions, to assert that the defendant’s ultimate purpose in putting up the second set of agreements was to circumvent the effect of this Circular. In his written submissions (encl 120 paras 58–59) learned counsel submitted:
- F 58. The Defendant, in (sic) cognisant of the circular prohibiting the plaintiff from having, transfer and/or sell (sic) property with Individual Title, had unilaterally back-dated the date of the 2nd SPA to precede the circular’s effective date, effectively flouting the circulars (sic).
- G 59. Thus, the Defendant by instructing his solicitors in (sic) masterminding and engineered such an exercise even to the extent to produce the impugned 2nd SPA and DOR by swapping pages and date or stamp meticulously to ensure the circular is circumvented.
- H [44] However, with respect, I asked myself, what would the defendant gain from seeking to cause the plaintiff to be unable to effect dealings of the two lots with foreign nationals, permanent residents or foreign nationals in the State of Selangor?
- I [45] The purchase price for Lot 207 is RM5,354,888 whereas the purchase price for Lot 197 is RM3,622,688. The prices for each lot far exceed the threshold for dealings if the property comes with a strata title and if the two lots have stratified titles, the plaintiff would be able to deal with them. In my considered view, it does not make sense for the defendant to deliberately prohibit the plaintiff from dealing with the two lots.

[46] Instead, I find the answers given by DW2 (DWS2 — para 21) to be probable ie having found that the plaintiff was the only person who had bought two units in that development, it was not commercially viable for the defendant to proceed with the development as a stratified development with the plaintiff ending up as being the only person to bear all the maintenance charges for the common property and facilities of this development, as provided under the Strata Management Act.

[47] This led to discussions said to be conducted by one Mr Ye LangHeng on behalf of the defendant, and which resulted in the plaintiff agreeing for the development to be converted from a stratified one to one with individual titles (DWS — 2 para 27). This agreement was documented in a letter. This letter (IDB 1 p 143 (Mandarin version) was put to the plaintiff who agreed that it carried his signature and thus, the inference is that he had agreed to it. The translated version of this letter in English can be found in IDB10 p 3.

#### Non-calling of Ye LangHeng

[48] The plaintiff called upon this court to draw an adverse inference pursuant to s 114 (g) of the EA against the defendant for failing to produce Ye LangHeng as a witness, the person who was said to have discussed with the plaintiff the variation of the development from one of stratified development to one carrying individual titles. I declined for the following reasons:

- (a) the assertion by DW2 is supported by a letter documenting the major change with a swimming pool to be constructed in Lot 207 and this letter carries the signature of the plaintiff;
- (b) that the plaintiff's agreement to the variation was conceded by the plaintiff as can be seen in plaintiff's written submissions (encl 120 para 16) that the defendant's representative one Mr Ye LangHeng has met and obtained the plaintiff's agreement on 25 October 2014;
- (c) therefore, the identity of the person, Ye LangHeng, said to have met up with the plaintiff for the discussions leading up to the agreement for the variation is known to the plaintiff; and
- (d) the defendant had not listed Mr Ye LangHeng in any of its Lists of Witnesses (encl 82 filed on 29 December 2021, encl 92 filed on 15 September 2023 and encl 105 filed on 11 October 2023), and in my considered view, there has been no suppression of evidence by the defendant. This is because the plaintiff was at liberty to have Mr Ye LangHeng produced by subpoena, if necessary, there being no property in a witness, see *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 (CA) where it is by the Court of Appeal that:

- A** (iv) He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Evidence Act 1950. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered as firstly the respondent never raised such an allegation and secondly has denied even making one. For this very reason the adverse inference under s 114(g) of the Evidence Act 1950 relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.
- B**
- C**
- D** (v) see also the article written by Justice Su Tiang Joo entitled 'Is There Any Property in a Witness: Can the Truth Be Owned By Any Party?' and published in the Journal of the Malaysian Judiciary (July 2023 publication) carrying his analysis that there can be no property in a witness as the truth cannot be owned by any party.
- E** Whether what was further agreed upon was carried out
- F** [49] In consideration for the agreement, the defendant was to construct a swimming pool within Lot 207 at the defendant's costs and to carry out renovation works to suit the plaintiff at the plaintiff's costs (DWS-2 para 28).
- G** [50] In due course, the defendant did complete the construction of the houses, built the swimming pool in Lot 207, had the titles converted on 9 March 2016 (agreed fact No 6) and vacant possession of the houses were delivered to the plaintiff under cover of letter of 1 August 2017 (encl 45 pp 139–141). That the plaintiff refused to accept the same does not detract from the fact that the defendant did perform its end of the bargain.
- H** Approbate and reprobate
- I** [51] The plaintiff insisted that it was only the common swimming pool which was to be converted into a private swimming pool, and the initial area allocated for the swimming pool was to be converted into a garden to be treated as common property to be shared by all in the stratified development which the plaintiff bought into. The plaintiff pointed out that in the agreement which he described as the 'Letter of Consent', it is set out that 'all other terms of the first SPA will be remained (sic) the same'.

[52] I find the plaintiff's construction of the agreement he had made with the defendant through Mr. Ye LangHeng to be far-fetched. If accepted, it would mean that he was at liberty to decide how the common property was to be restructured by continuing to have his house and to have the proposed swimming pool removed as part of common property with a private pool to be built at the defendant's costs in Lot 207 only for his use.

A

B

[53] This directly contradicts his assertion that all the other terms of the first SPA 'remain the same' ie that a stratified development remains but the common swimming pool meant for the entire stratified development is now without a swimming pool. The logical inference to be drawn is that the plaintiff is agreeable for parts of the common property to be carved out for his personal benefit ie the swimming pool, and that the character of the common pool meant to serve the whole development to be changed to a park or garden.

C

D

[54] Thus, the plaintiff is clearly approbating and reprobating or in common parlance blowing hot and cold. On the one hand he (unilaterally) agrees for the common property meant to serve the stratified development he had bought into to be amended but on the other sought to continue to seek specific performance of the self-same stratified development with the common property carrying features such as the common swimming pool. The law does not countenance this. See *Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd & Ors* [2022] MLJU 2007; [2022] CLJU 1942 (HC) para [29] where the High Court held:

E

F

However, in my considered view, D1 cannot be allowed to succeed in its challenge that Lee Nyan Chong was not a true director of D1 because:

(i) ...

(ii) ...

(iii) ...

(iv) ...

G

(v) for D1 to later assert that Lee Nyan Chong is not a director of D1 before a different forum is *to blow hot and cold*. It amounts to an abuse of process and D1 should not be allowed to approbate and reprobate. The law reports are replete with authorities for this principle. Her Ladyship, Mary Lim Thiam Suan JCA (now FCJ) in *Lee Loy & Ors v Ors v Poh Kam Sang & Anor* [2018] 3 MLJ 240; [2017] 1 LNS 2023 (CA):

H

[39] We further agree with the submissions of learned counsel for the respondents that it is clear that the appellants are approbating and reprobating at the same time. While on the one hand the appellants are resisting the summary application and contesting that they are more than squatters who have a right to stay, they are on the other hand, applying to the court to compel the respondents to sell the subject land or be given time to move. In *Cheah Theam Kheang v City*

I

- A *Centre Sdn Bhd (in liquidation) and other appeals* [2012] 2 CLJ 16; [2012] 1 MLJ 761, the Court of Appeal explained the principle of approbation and reprobation:
- [105] *We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath.*
- B On the one hand, he claims that the High Court order dated 16 July 2001 overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v News (UK) Ltd and Others* [1990] 3 All ER 376 at pp 383–384:
- C *There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.*
- D [55] As for not constructing a park, if at all, it is but a breach of a term of the fresh agreement, which sounds in damages.
- E [56] In the circumstances, with respect, in my considered view the assertion that the defendant had deliberately set out to circumvent the said Circular is a red herring and devoid of merits.
- F [57] I also find that the plaintiff is blowing hot and cold in continuing to enjoy financing from BOC premised upon the loan documentation premised upon the second set of SPAs but wanting to have them declared unlawful.
- G [58] I also find that the plaintiff is conversant with property dealings in Malaysia. Under cross-examination he said that he had started a line of business in Malaysia in buying and building houses since 2013 (NOP p 21 lines 23–30).
- H [59] In his closing submissions which was presented orally on 26 January 2024, the plaintiff submitted that if this court finds the second set of SPAs to be valid, learned counsel for the plaintiff sought for liquidated and ascertained damages for the delay in delivering possession of the two lots premised upon the second set of SPAs. However, this was not pleaded. In fact, the crux of the plaintiff's claim is that the second set of SPAs were to be declared invalid. Wherefore, this belated shot is bereft of any legs to stand on.
- I [60] DW1 was the transactional solicitor for both the SPAs and the financing. In the light of this court's findings, her conduct in attending to the transactions leaves much to be desired. This court will call upon the Registrar to have the notes of proceedings referred to the Bar Council for them to look into taking disciplinary proceedings against her.

**CONCLUSION****A**

Wherefore, I dismiss the two suits with costs to the defendant. After hearing parties, I award costs of RM40,000 subject to allocatur per suit to be paid by the plaintiff to the defendant in each suit.

**B**

*The two suits dismissed with costs of RM40,000 subject to allocatur per suit to be paid by plaintiff to defendant in each suit.*

Reported by Dzulqarnain Ab Fatar

**C****D****E****F****G****H****I**