IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-02(NCVC)(W)-1882-11/2015

BETWEEN

YAP SEONG YEE
(NRIC No.: 631006-10-7548) **...APPELLANT**

AND

EUREKA PROPERTY MANAGEMENT SDN BHD
(Company No.: 746857-W) **...RESPONDENT**

[In the High Court in Malaya at Kuala Lumpur
In the Federal Territory, Malaysia
(Civil Division)
Civil Action No: 22NCVC-762-06/2012]

BETWEEN

EUREKA PROPERTY MANAGEMENT SDN BHD
(Company No.: 746857-W) **...PLAINTIFF**

AND

YAP SEONG YEE
(NRIC No.: 631006-10-7548) **...DEFENDANT**

Heard Together With

IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-02(NCVC)(W)-1889-11/2015

BETWEEN

PHRA RUAM TEWIN
(Thailand Passport No.: C 714450) **...APPELLANT**

AND

EUREKA PROPERTY MANAGEMENT SDN BHD
(Company No.: 746857-W) **...RESPONDENT**

[In the High Court in Malaya at Kuala Lumpur
In the Federal Territory, Malaysia
(Civil Division)
Civil Action No: 22NCVC-40-01/2014]

BETWEEN

EUREKA PROPERTY MANAGEMENT SDN BHD
(Company No.: 746857-W) **...PLAINTIFF**

AND

PHRA RUAM TEWIN
(Thailand Passport No.: C 714450) **...DEFENDANT**

CORAM:

HAMID SULTAN BIN ABU BACKER, JCA
PRASAD SANDOSHAM ABRAHAM, JCA
ASMABI BINTI MOHAMAD, JCA

JUDGMENT OF THE COURT

INTRODUCTION

[1] The two appeals, W-02(NCVC)(W)-1882-11/2015 ("Suit 1882") and W-02(NCVC)(W)-1889-11/2015 ("Suit 1889") emanate from two Kuala Lumpur High Court suits which were jointly tried and heard together before Her Ladyship Dato' Su Geok Yiam.

[2] The Appellant in Suit 1882 appeals against the whole of the decision of the High Court at Kuala Lumpur dated 30.9.2015 which allowed the Respondent's claim against Madam Yap ("the Appellant in Suit 1882") and dismissed Madam Yap's Counterclaim against the Respondent with cost of RM50,000.00. In Suit 1889, the court allowed the Respondent's claim against Phra Ruam ("the Appellant in Suit 1889") with cost of RM50,000.00

[3] For ease of reference, Yap Seong Yee will be referred to as "Madam Yap", Phra Ruam Tewin will be referred to as "Phra Ruam" and Eureka Property Management Sdn Bhd will be referred to as "Eureka".

BRIEF BACKGROUND FACTS

[4] Madam Yap is a Malaysian citizen and is the proprietor of an office suite known as Parcel No. J-3A-13, Storey No 4, Block J, Jalan Solaris, Mont' Kiara, 50480 Kuala Lumpur together with accessory parcels no. AAC-J-04-13-1 and AAC-J-04-13-2 ("the Property"). Madam Yap purchased the Property from Sunrise Century Sdn Bhd ("the Developer") by way of a Sale and Purchase Agreement dated 27.12.2004. Madam Yap obtained a loan from United Overseas Bank Malaysia Berhad ("UOB") to finance her purchase of the Property from the Developer. By virtue of Clause 6 of the Loan Agreement with UOB, Madam Yap assigned all benefits, rights, title and interest in the Property in favour of UOB.

[5] Eureka is a private company limited by shares and is incorporated in Malaysia under the Companies Act 1965. Eureka had entered into a Sale and Purchase Agreement dated 10.04.2008 ("the 1st SPA") with Madam Yap where Eureka agreed to buy the Property at the purchase price of RM2,000,000.00. The Developer agreed to the sale of the Property from Madam Yap to Eureka. A 10% deposit was paid upon Madam Yap signing the 1st SPA. At the time, the 1st SPA was executed, a separate Strata Title has not yet been issued.

[6] Under the 1st SPA, the balance of the Purchase Price in the sum of RM1,800,000.00 was to be paid to the Vendor's Solicitors as stakeholders within 3 months from date of receipt by the Purchaser's Solicitors of the Developer's Consent, failing which the Vendor shall grant

the Purchaser a further period of one month to pay the Balance Sum provided that the Purchaser shall pay to the Vendor interest at the rate of 10% per annum on such part of the balance sum which remained unpaid from the expiry of the Completion date until actual payment.

[7] If the Purchaser obtains a loan from a financial institution, the Vendor shall render all assistance in the purchase of the Property, the Vendor shall provide all assistance, including giving of undertaking to refund the loan in the event the relevant documents could not be perfected between the Vendor and her financier and/or if the Deed of Assignment could not be perfected between the Vendor and Purchaser.

[8] The parties had also authorised the Vendor's Solicitor to utilise the balance sum to pay the Vendor's Financier to redeem the Property upon the undertaking of the Vendor's Financier to refund the redemption sum in the event, the Deed of Receipt and Reassignment and the Deed of Assignment cannot be perfected for any reason whatsoever.

[9] Under the terms of the 1st SPA, the Completion Date fell on 04.07.2008 and the Extended Completion Date fell on 04.08.2008. The balance purchase price of RM1,800,000.00 was not paid on the Completion Date and/or on the Extended Completion Date. Eureka and Madam Yap agreed further to extend the time to complete the 1st SPA up to 60 days, bringing the Final Extension Date to 05.10.2008 from 05.08.2008 ("the Extension Agreements").

[10] On 23.09.2008, UOB, Eureka's financier released the sum of RM1,052,962.33 being the redemption sum. However, Eureka did not make a payment of the balance purchase price of RM447,037.67 on the Final Extension Date.

[11] On 08.10.2008, Eureka via its solicitors, terminated the 1st SPA and demanded for all sums paid to be refunded by Madam Yap, including compensation in the sum of RM200,000.00.

[12] On 12.11.2009, Eureka commenced an action at the Kuala Lumpur High Court vide Suit No. S-22-13-2009 ("Suit 13") for breach of the 1st SPA against UOB as the 1st Defendant and Madam Yap as the 2nd Defendant to claim for various reliefs but not including specific performance based on Madam Yap's alleged breach of contract of the 1st SPA.

[13] In her defence, Madam Yap denied having breached the 1st SPA and contended that it was Eureka which had breached the 1st SPA. She counterclaimed for, amongst others, specific performance of the 1st SPA.

[14] On 06.03.2009, Eureka discontinued Suit 13 against UOB with liberty to file afresh. On 05.06.2009, Eureka filed an application for summary judgment under O.14 of Rules of High Court 1980.

[15] The application was heard before YA Datin Zabariah Mohd Yusof and was dismissed. The learned Judge found Eureka's obligation to pay the full purchase price was a fundamental term of the 1st SPA and failure

to pay the said sum within the prescribed time was a breach of the 1st SPA. In essence, the learned Judge found that Eureka had no right to claim a refund of the sums paid and/or for compensation. Eureka appealed to the Court of Appeal against that decision. However, it did not pursue the appeal.

[16] Whilst Suit 13 against Madam Yap was pending, after seeking advice from her conveyancing solicitors, Madam Yap entered into a Sale and Purchase Agreement dated 22.09.2010 to sell the Property to Phra Ruam, a Thai national and a Buddhist monk at a purchase price of RM2,000,000.00 ("the 2nd SPA"). The strata title was transferred by the Developer to Phra Ruam and Phra Ruam became the registered owner of the Property.

[17] In May 2010, Dragon Anabolics, a business set up by monks of the Malaysia Dhamma Sakyamuni Monastery as the landlord, and Sreenevasan Young, as the tenant, entered into a Tenancy Agreement dated 01.05.2010 for the period of 2 years at a monthly rental of RM9,120.00.

[18] Eureka then, by way of its solicitor's letter dated 13.07.2011, sought to tender the balance purchase price of RM447,037.67 by way of a HSBC cheque in that amount. Madam Yap, through her solicitor, did not accept the payment of balance purchase price. Eureka pointed out that Madam Yap had earlier counterclaimed for specific performance. Madam Yap then amended her Defence and Counterclaim to remove the prayer for specific performance and accepted Eureka's repudiation of the contract.

[19] On 09.05.2012, Eureka discontinued Suit 13 against the Madam Yap with liberty to file afresh, as they intended to commence a fresh action for specific performance.

[20] On 22.06.2012, Eureka filed a fresh suit no. 22NCVC-762-06/2012 (2012 Suit) against the Madam Yap for reliefs including specific performance. Eureka claimed that they had been willing and able to pay the balance purchase price at all times to Madam Yap, and that Madam Yap had breached the 1st SPA.

[21] Madam Yap in her defence pleaded that it was the Plaintiff who was in breach of the 1st SPA and counterclaimed that she is entitled to damages for loss of rental income as well as a declaration that she was entitled to forfeit the deposit of RM200,000.00 as well as RM100,000.00 and RM300,000.00 pursuant to the Extension Agreement.

[22] On 29.01.2014, Eureka filed a new suit no. 22NCVC-40-01/2014 against Phra Ruam for damages for fraud in executing the 2nd SPA for the same Property with Madam Yap.

IN THE HIGH COURT

Eureka's Case

[23] Eureka pleaded the following:

(a) UOB had used a sum of RM1,052,962.33 from Eureka's loan account with UOB to set off the redemption sum of Madam Yap's loan with UOB;

(b) Eureka also pleaded for the purpose of the 1st SPA whereby Madam Yap agreed to sell and Eureka agreed to buy the Property, the following salient Clauses are relevant:

i. In Clause 1, the Property was to be sold free of encumbrances at purchase price of RM2,000,000.00, where RM200,000.00 being the deposit under the 1st SPA had been paid by Eureka to Madam Yap at the time the 1st SPA was executed;

ii. In Clauses 2 and 3, Madam Yap was to obtain the consent of the Developer to the sale and assignment of the property to Eureka within 1 month from date of 1st SPA;

iii. In Clause 4, the balance purchase price of RM1,800,000.00 was to be paid by Eureka to Madam Yap within 3 months ("the Completion Date") of the date of the receipt of Developer's consent by Eureka's solicitors, failing which the completion date was extended for a period of one month to pay the balance purchase price with interest thereon at 10% per annum;

iv. In Clause 9, the balance purchase price shall only be paid upon receipt by Eureka's solicitors of the following documents:

- Duly executed Deed of Receipt and Reassignment between Madam Yap and UOB;

- Duly executed Deed of Assignment between Madam Yap and Eureka;

- All other document evidencing title to the property

- A certified true copy of Developer's undertaking.

v. In Clause 10, Eureka and Madam Yap shall execute a Deed of Assignment in favour of Eureka and the same shall appoint Eureka's solicitors as stakeholders;

vi. In Clause 21, if Madam Yap was in breach of the 1st SPA, Eureka shall be entitled to terminate the same, whereupon all monies paid towards the purchase price of the Property shall be refunded by Madam Yap to Eureka, free of interest. Madam Yap also shall pay a sum equivalent to the deposit as compensation.

(c) Eureka also pleaded the existence of an oral agreement between Madam Yap and Eureka before or at the time parties

entered into the 1st SPA whereby it was agreed that Eureka would only obtain a loan from UOB to assist it to pay the balance purchase price in consideration of Madam Yap selling the Property to Eureka;

(d) The parties entered into an Extension Agreement, contained in letter from Eureka's solicitor dated 29.08.2008, where the Final Completion Date was extended to 05.10.2008. However, on the Final Extension Date, Eureka did not pay the balance purchase price because Madam Yap did not perform her contractual obligations as stipulated in Clause 9. Madam Yap had failed to deliver to Eureka's solicitors the documents set out in Clause 9 on or before 05.10.2008;

(e) Madam Yap's solicitors had asked for an extension of time until 09.02.2008 to comply with the contractual terms but this was rejected by Eureka's solicitors. Eureka then terminated the 1st SPA and demanded refund of all monies paid to, accepted and received by Madam Yap as well as compensation in the sum of RM200,000.00 in accordance with Clause 21 of the 1st SPA;

(f) Under Suit 13, Madam Yap had counterclaimed for specific performance. Hence, Eureka pleaded that Madam Yap is irrevocably bound by her election to claim for specific performance in the Suit 13 and cannot resile from it;

(g) The 2nd SPA was a sham and a fraud perpetrated to cheat or deprive Eureka of its right to complete the 1st SPA and to become the legal and beneficial owner of the Property;

(h) Eureka also pleaded that upon payment of the balance purchase price of RM447,037.67 into Court on 18.08.2012, Eureka had become the beneficial owner of the Property; and

(i) Therefore, Eureka claimed for specific performance of the 1st SPA as well as the cancellation of the registration of name of Phra Ruam as the owner of the Property.

Madam Yap's Case

[24] Madam Yap's Defence to Eureka's claim could be briefly stated as follows:

(a) Madam Yap pleaded that it was Eureka who had breached the 1st SPA and that her contention was accepted by YA Datin Zabariah binti Mohd Yusof on 16.09.2009 when the learned Judge dismissed Eureka's application for a summary judgment against Madam Yap.

(b) However, subsequently Madam Yap had sold the Property to a third party, i.e. Phra Ruam, because she needed the money. Hence, on 22.09.2010, Madam Yap entered into the 2nd SPA to sell the property to Phra Ruam.

(c) On 26.04.2011, by an affidavit affirmed by her, Madam Yap gave notice of her acceptance of Eureka's repudiation of the 1st SPA.

(d) This averment was relied upon by Eureka in its application to withdraw Suit 13 with liberty to file afresh.

(e) Madam Yap had communicated the acceptance of the repudiation of the 1st SPA to Eureka when she filed her Defence and Counterclaim on 08.04.2013 for the 2012 Suit. Therein, the Court as well as Eureka were informed of the 2nd SPA.

(f) As Eureka did not pay the full purchase price to Madam Yap, RM2,000,000.00 by the Final Extension Date of 05.10.2008, Madam Yap has the right to repudiate the 1st SPA and treat the agreement as having come to an end.

(g) On 13.07.2011 by her solicitor's letter, Madam Yap rejected Eureka's proposed tender of balance of purchase price.

(h) Subsequently, on 22.08.2011, Madam Yap's learned Counsel applied to amend her Defence in Suit 13 by deleting the prayer for specific performance. Eureka's learned Counsel did not object to the application.

(i) As a result of the breach of the 1st SPA, Madam Yap had suffered loss in the form of rental from the Property. She had left the Property vacant from April 2008 until September 2011. The monthly rental is about RM15,000.00. Hence, she has claimed for loss of total rental of RM540,000.00 for a period of 36 months from October 2008 until September 2011. She has also claimed for a sum of RM135,000.00 that was incurred by her for professional charges for the preparation of agreement, professional advice and conduct of case and others.

(j) It was only on 18.10.2012 that Eureka paid into Court the balance purchase price of RM447,037.67 and in 29.01.2014, Eureka sued Phra Ruam.

Phra Ruam's Case

[25] Phra Ruam's Defence to Eureka's claim could be briefly stated as follows:

(a) Phra Ruam denied that he had practised fraud on Eureka;

(b) He also pleaded that Madam Yap had first sold the Property to Eureka by way of the 1st SPA but Eureka defaulted payment of the balance purchase price on 05.10.2008 and Madam Yap terminated the 1st SPA;

(c) Phra Ruam then bought the same Property from Madam Yap and on 22.09.2010, he entered into the 2nd SPA with Madam Yap;

(d) The transfer of the Property was done on 24.03.2011;

(e) Eureka withdrew Suit 13 on 09.05.2012 and on that date, Eureka still had not paid the balance purchase price to Madam Yap;

(f) The learned Judge in the summary judgment application had found that Eureka was the party in default of the 1st SPA;

(g) Madam Yap had notified Eureka that she has accepted the repudiation of the 1st SPA by Eureka and in doing so, the 1st SPA had ceased to exist;

(h) Phra Ruam is a bona fide purchaser for value because the purchase price for the property was paid partly by Phra Ruam and partly from contributions by the devotees of a Buddhist Society;

(i) Madam Yap is a devotee of the Buddhist society and she has received a sum of RM1,100,000.00 from Phra Ruam and the balance purchase price of RM900,000.00 was a donation by Madam Yap; and

(j) The Property is rented out and the Buddhist Society is using the rentals for its expenses and activities. The office bearers of the Buddhist Society are dealing with the tenancy and the rental.

[26] Based on the above, Phra Ruam prayed for Eureka's claim against him to be dismissed with costs.

[Note: The salient facts set out above were extracted from the Grounds of Judgment (GoJ) as well as the written submissions filed herein with and/or without modifications].

THE ISSUES

[27] The issues posed for the determination of the High Court are as follows:

(a) Whether Madam Yap is irrevocably bound by her election to seek specific performance against Eureka in Suit 13, so that she must continue with the 1st SPA dated 10.04.2008 made by her and Eureka, and permit Eureka to complete the same?

(b) Whether Madam Yap may, notwithstanding her election to seek specific performance in the 2009 Suit, withdraw or resile from her said election?

(c) Whether Madam Yap is in breach of the 1st SPA by:

i. Stating in paragraph 9 of her affidavit filed in Suit 13 that she accepts Eureka's breach of the 1st SPA?

ii. Rejecting Eureka's proposed tender of balance purchase price of RM447,037.67 on 13.07.2011?

iii. By repeating in paragraph 31 of her Amended Defence in Suit 13 that she accepts Eureka's breach of the 1st SPA and by deleting her Counterclaim for specific performance of the same?

iv. By letting out the Property to a tenant and receiving rental in respect of the letting?

(d) Whether the 2nd SPA dated 22.09.2010 made by Madam Yap and Phra Ruam and the subsequent registration of Phra Ruam as the owner of the Property on 24.03.2011 was in breach of the 1st SPA?

(e) Whether the 2nd SPA dated 22.09.2010 is null and void for fraud and the subsequent registration of the transfer of the title to Phra Ruam as the owner on 24.03.2011 is defeasible and ought to be set aside by reason of fraud on the part of Madam Yap and/or Phra Ruam and/or their agents and/or the Developer acting individually or in any combination thereof?

(f) Whether Eureka is entitled to specific performance of the 1st SPA and/or the cancellation of the name of Phra Ruam as the registered owner of the Property and other reliefs sought by in Eureka's Statement of Claims in the 2012 and 2014 Suits?

(g) Whether Madam Yap is entitled to the declaration and sums claimed in her Counterclaim in the 2012 Suit? and

(h) Whether Madam Yap had accepted Eureka's alleged repudiation of the 1st SPA and had informed the same in April/May 2011 and again in August/September 2011?

FINDINGS OF THE LEARNED JUDGE

[28] The learned Judge made the following findings:

(a) Madam Yap's Counsel relied on the decision of Her Ladyship Datin Zabariah Mohd Yusof dated 16.09.2009, in the summary judgment application, which found Eureka was the party at fault for the non-completion of the 1st SPA as well as the New Zealand case of ***Chatfield v Jones [1990] 3 NZLR 285*** and the English case of ***Johnson and Another v Agnew [1979] 1 All ER 883***, in her contention that she was entitled to elect which of the two remedies, damages or specific performance to abandon before the trial of the 2013 Suit. Madam Yap had opted to abandon the claim for specific

performance. This line of submission was adopted in full by Phra Ruam.

(b) The above issues were found by the learned Judge to be without any merit based on the doctrine of *res judicata*. The second issue too could not be sustained because by virtue of the doctrine of *stare decisis*, the Court was bound to follow the decisions of the Malaysian Court of Appeal in ***Toko Palayakat Jamal (M) Sdn. Bhd. (dahulunya dikenali sebagai Abdul Jamal Trading Sdn. Bhd.) v Soon Seng Company Sdn. Bhd. [2004] 4 AMR 643*** *and* ***Lim Ah Moi v AMS Periasamy Suppiah Pill [1997] 3 CLJ 629***, wherein it was held, once a party had made an election to pursue the remedy in the form of specific performance, that party was bound to continue to pursue that remedy and it could no longer resile from that election.

(c) It was not opened to Madam Yap to accept Eureka's repudiation of the 1st SPA as having come to an end because Madam Yap had kept the contract alive until 13.07.2011 as she was still pursuing her claim for specific performance of the 1st SPA. Madam Yap made the amendment to her Counterclaim to delete her claim for specific performance only on 22.08.2011.

Whether Madam Yap have the right to sell the property to Phra Ruam under the 2nd SPA?

(d) The Court was of the considered view that Madam Yap did not have the right to sell the property to Phra Ruam under the 2nd SPA. On the date of the 2nd SPA on 22.09.2010, Madam Yap was still maintaining her claim for specific performance of 1st SPA in Suit 13. Madam Yap did not inform the Court or Eureka that she had accepted Eureka's breach of contract and that she had sold the Property to Phra Ruam.

(e) Madam Yap's own solicitor in Suit 13 testified that Madam Yap could only sell the property to Phra Ruam if certain steps were taken in Suit 13. The Court was of the view that on the facts, such steps to address Madam Yap's intention to sell the Property to Phra Ruam had not taken at all.

Whether there was fraud in the purported sale of the property to Phra Ruam under the 2nd SPA.

(f) The Court found that the real object for the purported sale of the Property to Phra Ruam was to put the Property out of Eureka's reach, whatever the result of Suit 13 and/or the 2012 Suit. The only reasonable inference that the Court could draw from Madam Yap's conduct was that she was determined to cheat Eureka by dishonestly denying Eureka its existing right to complete the 1st SPA and to be registered as the owner of

the Property and to unjustly enrich herself and Phra Ruam from the rentals derived from it, thereby causing injury and loss to Eureka. Therefore, Madam Yap with the complicity of Phra Ruam, Messrs H.C. Tan & Zahani, their common solicitor, and Dragon Anabolics, deliberately created the 2nd SPA and transferred the Property to Phra Ruam and let out the Property to a tenant in order to benefit from the rentals to Eureka's detriment.

Whether Madam Yap had concealed the 2nd SPA?

(g) In order to achieve the fraudulent purpose, it was imperative that Madam Yap kept silent about the 2nd SPA to avoid possibility of Eureka taking legal action to obstruct the sale and transfer of the Property to Phra Ruam. As stated, at the time the Property was sold to Phra Ruam, Madam Yap was still counterclaiming for specific performance of the 1st SPA against Eureka.

(h) On the facts of the case, once the title of the Property was registered in Phra Ruam's name, Madam Yap coyly sought to change her stance in amending her Counterclaim to delete her claim for specific performance. The Court accepted Eureka's Counsel's submission that Madam Yap knew exactly what she was doing when not giving full and frank disclosure of the sale and transfer of the Property to Phra Ruam.

Whether the 2nd SPA is a sham and was created to conceal the true state of affairs?

(i) Based on the evidence, the Court found the 2nd SPA was a sham and was deliberately created to conceal the true state of affairs. The conclusion is irresistible that it was created by Madam Yap and Phra Ruam and Messrs H.C. Tan & Zahani, to lend a modicum of credibility to the fraudulent transaction.

Whether Phra Ruam was involved in fraud?

(j) It quite difficult to reconcile why Madam Yap chose to sell the property to Phra Ruam, who is ostensibly a Buddhist monk. The evidence showed that Phra Ruam does not have the ability to pay the purported purchase price of RM2,000,000.00. In giving evidence, Phra Ruam had admitted that under the 227 Buddhist precepts observed by him, he is not allowed to hold money. Also, yearly income was established to be not in excess of RM1,000,000.00. Phra Ruam stated that a body of monks called the Sangha had given approval to him to sign the 2nd SPA but no one from the Sangha was called to give evidence of this.

(k) Therefore, there was every reason to doubt Phra Ruam's ability to pay the purchase price of RM2,000,000.00 under the 2nd SPA and yet Madam Yap was prepared to sell the same to him. The Court arrived at the irresistible conclusion that

the only reason to have Phra Ruam involved in the transaction was to present a veneer of respectability and credibility to a sham transaction.

Whether Phra Ruam willingly allow the fraud to be committed?

(l) The Court found that Phra Ruam had willingly allowed the fraud to be practised on Eureka. He was willing to go along with the wishes of Madam Yap and Madam Yap had stated that she has known Phra Ruam for more than 15 years. In relation to the 2nd SPA, it was Madam Yap who had referred Phra Ruam to Messrs H.C. Tan & Zahani and asked Phra Ruam to appoint that law firm to act for him in the 2nd SPA. It is important to note that Messrs H.C. Tan & Zahani was also acting for Madam Yap in the 1st SPA as well as Suit 13.

(m) Phra Ruam stated that the Committee and Madam Yap had decided to transfer the title of the Property to his name without full payment of the purchase price, contrary to the terms of the 2nd SPA. Phra Ruam was legally represented in the 2nd SPA by Messrs H.C. Tan & Zahani and yet, he merely followed the wishes of Madam Yap. The Court came to the conclusion that in November 2012, Phra Ruam was a willing participant together with Madam Yap in the execution of the fraud against Eureka.

Whether Madam Yap and Phra Ruam committed fraud?

(n) The Court was satisfied that Eureka had succeeded in proving on a balance of probabilities that both Madam Yap and Phra Ruam are guilty of fraud against Eureka. The dishonest acts of the two defendants showed that they intended to deprive Eureka from its existing right of owning the Property.

Whether Dragon Anabolics was also involved in the fraud that was committed by Madam Yap and Phra Ruam?

(o) The Tenancy Agreement was made on 01.05.2010. At the time, Madam Yap was still the registered owner of the Property and this was before the 2nd SPA was entered into. Madam Yap could have let out the Property in her own name but she did not. The Court found that she did not do so because she was desperate to disguise her involvement in the Tenancy Agreement with Sreenevasan Young. In addition, there was no document to show that Madam Yap had allowed Dragon Anabolics to let out the Property and to keep the rentals to meet its expenses.

(p) Thus, although the Property was legally owned by Madam Yap and let out by Dragon Anabolics, Madam Yap was the real power behind the scene. She could easily influence the monks to help her in denying Eureka the right to own the Property. For this reason, Madam Yap had to account to

Eureka for the rentals received under the Tenancy Agreement since she was the effective landlord and Dragon Anabolics was just a mere puppet that was used and manipulated to disguise Madam Yap's role in the fraudulent scheme.

Whether Madam Yap had breached the 1st SPA by resiling from her election, i.e. specific performance?

(q) In Suit 13, Madam Yap had elected to reject Eureka's breach and to proceed with the 1st SPA. Later, Madam Yap wrongfully resiled from her election by seeking a declaration for her to refund the redemption sum paid to her bank UOB from monies from Eureka's loan account with UOB. Eureka then proposed to complete the 1st SPA by tendering the balance purchase price. At this point in time, Madam Yap was still counterclaiming for specific performance. However, the balance purchase price was rejected by Madam Yap through her solicitors. The reason stated was that Madam Yap had abandoned this remedy and that Eureka's attempt had been overtaken by events.

Whether Eureka is entitled to seek remedy of specific performance of the 1st SPA?

(r) The Court found that Madam Yap's rejection of the balance of purchase price gave Eureka the right to seek remedy of specific performance. Since at the time Madam Yap was still

claiming for specific performance, she ought to have completed the 1st SPA.

(s) To do justice to the parties, Court may order a contract to be specifically performed notwithstanding time is of the essence of the contract. In ***Charanjit Singh a/l Ver Singh @ Veer Singh & Anor v Mah Seow Haung [1995] 1 AMR 204***, the Court granted specific performance of a sale and purchase agreement in 1994 although the completion date was on 10 December 1979.

Whether Eureka was ready, able and willing to complete the 1st SPA?

(t) The Court found Eureka to be ready, able and willing to complete the 1st SPA from 13.07.2011. Eureka had paid the deposit of RM200,000.00, the sum of RM300,000.00 being difference of balance purchase price and loan, the sum of RM100,000.00 being compensation for late completion of the 1st SPA and the balance purchase price of RM447,037.67 which was paid into Court on 18.10.2012.

(u) It is trite law that the determination of whether a party is ready, able and willing to perform a contract is a factual matter. Payment of cash is not the only means of determining payment. In the case of ***Farquharson v Pearl Assurance Co. Ltd. [1937] 3 All ER Ann 124***, an offer to pay an amount

by cheque was held by Court to amount to evidence of readiness, ability and willingness to perform the obligation.

[29] The gist of the learned Judge's reasonings was extracted from the GoJ either with or without modifications.

OUR DECISION

The law

[30] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[31] In the course of that, we had sought guidance from the very often quoted the case of ***Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin [2003] 2 MLJ 97*** where the Court of Appeal held as follows:

> *"an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence."*

[32] Reference is also made to the decision of the Federal Court in ***Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng [2004] 4 CLJ 309*** where the Federal Court held that the test of *"insufficient judicial appreciation of evidence"* adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or

findings correctly on the basis of the relevant law and the established evidence.

[33] In the above case, the Federal Court had also stated, the Court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation of the evidence by the trial court and reverse the decision if it is wrong.

[34] At the end of the case, the trial judge has a duty to explain how the said court had come to its findings and/or how it appraised the evidence and issues which will determine the outcome of the case before it. In doing so the Judge need not explain or identify every factor that he had considered. If the learned Judge failed to do so, his decision can be set aside (see ***English v Emery Reimbold & Strick Ltd, DJ & C Whithers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (trading as Freightmaster Commercials) v Commissioner of Police Metropolis [2002] EWCA Civ 605, [2002] 3 ER 385***).

[35] The appellate court must be slow to interfere with the findings made by the trial court unless if it be shown there was no judicial appreciation of the evidence adduced before it (see ***Hamit Matusin & Ors v Penguasa Tanah dan Survey & Anor Appeal [2006] 2 CLJ 251 ; Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87***).

The Appeal Before Us

[36] Eureka's cause of action against Madam Yap was for breach of contract in failing to deliver the relevant documents provided under Clause 9 of the 1st SPA. Eureka did not seek the relief in the form of a specific performance, it had claimed, amongst others for:

(a) A declaration that Madam Yap was in breach of the 1st SPA read with the Extension Contract as a result of her failure to complete the sale within the prescribed time as agreed; and

(b) Payment of the deposit in the sum of RM200,000.00, the difference between the Purchase Price and the Loan in the sum of RM300,000.00, compensation for the late completion of RM100,000.00, Redemption sum of RM1,052,962.33 and compensation in the sum of RM200,000.00.

[37] It is apparent from the reliefs sought**,** Eureka had elected to terminate the 1st SPA and pursue remedies based on a valid termination of the 1st SPA. It did not pursue the remedy in the form of a specific performance. Consistent with the stand taken, Eureka did not seek to preserve the Property either by way of an interim injunction and/or a private caveat. It is clear here, from the outset, it had no intention to pursue a claim for specific performance but had instead opted to claim for damages for breach of the terms of the 1st SPA.

[38] Madam Yap, on the other hand, had denied that there was a breach of the term of the 1st SPA. She further pleaded that it was Eureka which had failed to complete the 1st SPA as it had failed to make full payment within the time stipulated in the 1st SPA and/or within the extended time as agreed by the contracting parties. Instead, it was Madam Yap who pursued a claim for a specific performance.

[39] Eureka then filed an Order 14 Application which was heard by Her Ladyship Justice Zabariah Mohd Yusof, who dismissed the Application. Justice Zabariah found Eureka had failed to make full payment in the manner as prescribed under Clause 4 of the 1st SPA. Hence, Eureka was found to be in breach of the 1st SPA. According to the learned Judge, it was a fundamental breach of the term of the 1st SPA. The obligation under Clause 9 was only a subsidiary term. As Eureka had breached a fundamental term of the 1st SPA it could not seek compliance of the 1st SPA.

[40] Therefore, Eureka had no right for a refund of the sums already paid and/or for compensation. Aggrieved by the above-stated decision Eureka appealed to the Court of appeal, however, it did not pursue the appeal.

[41] Upon our evaluation of the evidence before the Court we found that the learned Judge had misunderstood the law and the principle applicable for the grant of a remedy for specific performance. We were guided by the various relevant cases cited by the learned Counsels for Madam Yap and Phra Ruam such as ***Leelavathi K Govindasamy v Sivan Subramaniam & Anor [2015] 3 MLJ 187 ; Wong Kup Sing v Jeram***

Rubber Estates Ltd [1969] 1 LNS 201 ; [1969] 1 MLJ 245 ; Pakharsingh v Kishansingh AIR [1974] Raj 112 ; Malaysian Building society Berhad v Prima First Development Sdn Bhd And Another Appeal [2013] 5 CLJ 239, where the Courts had held that before the Court grants the remedy in the form of specific performance, the Court must be satisfied that there must be a continuance readiness and willingness of the part of the party seeking for the relief in the form of specific performance to perform his part of the bargain from the date of the contract up to the date of hearing. In the case quoted above, the party seeking for a specific performance must not only demonstrate to the Court its willingness or readiness to perform his obligation but he must also adduce evidence of his willingness and readiness to do so.

[42] Turning now to the facts of the case at hand, we observed that the learned Judge had taken the 13.07.2011 as the date to determine if Eureka was ready, willing and able to fulfil its obligation under the 1st SPA instead of the date as prescribed in the 1st SPA and/or from the date of the 1st as agreed by both parties. At the date of the alleged breach, Eureka had a choice whether to treat the 1st SPA as having been repudiated and claim for damages for breach of contract or to seek the remedy in the form of a specific performance. As Eureka had opted for damages in lieu of repudiation, it could not pursue its claim for a specific performance. In addition to that Eureka had not taken all reasonable steps to preserve the *status quo* of its claim. This proposition is supported by the case quoted by learned Counsel for Madam Yap in ***Johnson and Anor v Agnew [supra]*** where Lord Wilberforce stated as follows:

"Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity. It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot after words seek specific performance. This is simply because the contract has gone, what is dead is dead."

[43] The Federal Court in ***Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597*** had adopted the principle of law enunciated in ***Johnson and Anor v Agnew [supra].*** His Lordship Gopal Sri Ram FCJ said:

"[27] In the second place, particular attention must be paid to the wording of the subsection. It says '*fails to do any such thing*' within stipulated time. The words '*any such thing*' refer to the promise in its entirety. In my judgment, s 56(1) should be read together with s 40 of the Act when determining whether a promiser has committed a breach of such a nature that goes to the root of the contract. This is sometimes described as a fundamental breach. In the third place, s 56(1) as is the case with the other provisions of the Act are *ipsissimis verbis* the corresponding provisions of the Indian Contract Act 1872. That Act was drafted at the time in the history of English common law when decided cases, spoke of the voidability of broken contracts and a right to rescind such contracts. That is what Lord Wilberforce in Johnson & Anor v Agnew referred to as 'the contrary indications' that may be disinterred from old authorities.' In my judgment, the phrase 'becomes voidable at the option of the promisee' in section 56(1) means this: a party not in default has a choice whether to put an end to the contract or signify his

> or her acquiescence in its continuance when the party in default commits a fundamental breach of contract by not performing his entire promise within the time stipulated by contract, provided that time is of the essence of the contract."

[44] As reflected in the pleadings and the prayers sought, Eureka had opted to treat the 1st SPA as having been repudiated and had come to an end (see Appeal Record Jilid 3/2 at page 880), thus entitling Eureka to claim for damages for breach of contract and a refund of all monies paid pursuant to the 1st SPA. Therefore, Eureka could not now turn around and say that it was willing, able and ready to perform the contract. It was also evidenced through the testimony of PW1, as at 08.10.2008, Eureka was not capable of honouring its part of the bargain to pay the balance purchase price as agreed by both parties.

[45] In addition to the above, Her Ladyship Justice Zabariah Mohd Yusof, in dismissing Eureka's application for summary judgment had also resolved that Eureka had committed a breach of a fundamental term of the 1st SPA as it had failed to settle the balance purchase price within the time permitted by the 1st SPA and/or further time as agreed by both parties. Pursuant to section 23 of the Specific Relief Act 1950, Eureka which had become incapable of performing its part of the bargain could not approach the court for a remedy in the form of a specific performance.

[46] Further, pursuant to the Common Agreed Facts filed herein (see pages 878 to 882), Eureka admitted that it did not pay the balance of the purchase price of the Property amounting to RM1,800,000.00 in full on

the completion date or extended completion date (see paragraph 7 of the same).

[47] At paragraph 11 of the same document as stated above, Eureka stated that it had through its solicitors, terminated the 1st SPA and demanded that all sums paid under the 1st SPA to be refunded to it by Madam Yap, including compensation of RM200,000.00.

[48] The learned Judge had instead relied on Madam Yap's Counterclaim for specific performance to rule that as Madam Yap had made an election to pursue the remedy for specific performance, she was bound to continue to pursue that claim and could not resile from her election. The learned Judge relied on ***Toko Palayakat Jamal (M) Sdn Bhd v Soon Seng Company Sdn Bhd [supra]*** and ***Lim Ah Moi v AMS Periasamy Suppiah Pillay [supra]***.

[49] The learned Judge had clearly misunderstood the authorities cited by Eureka and failed to appreciate that it is settled law that Madam Yap having taken the position to claim for specific performance, was at liberty to change her position on the 1st SPA. Reference is again made to the case of ***Johnson v Agnew [supra]*** quoted by learned Counsel for Madam Yap as follows:

> "But it is more difficult to agree that a party, who has chosen to seek specific performance, may quite well thereafter, if specific performance fails to be realised, say, 'Very well, then, the contract should be regarded as terminated." It is quite consistent

with a decision provisionally kept alive, to say,"Well this is no use – let us now end the contract's life." *A vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the contract; what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under control of the court which involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for specific performance, but to ask the court to determine the contract."*

[50] The final issue raised by Madam Yap was that Eureka was granted leave to file a fresh action against Madam Yap for specific performance when Suit 13 was discontinued pursuant to the application filed by Eureka vide Enclosure 28, only meant that that Eureka is allowed to commence fresh proceedings but not that it is entitled to the relief in the new action.

[51] Based on facts as alluded above, we were of the view that Eureka is not entitled to specific performance of the 1st SPA. However, based on the facts and the evidence adduced before the learned Judge, we were of the view that Eureka was justified in repudiating the 1st SPA as Madam Yap had failed to deliver the documents stipulated in Clause 9 of the 1st SPA to Eureka's solicitors. As at 03.10.2008, when Eureka's solicitors wrote to Madam Yap's solicitors to propose payment of the remainder of the balance purchase price on terms that included the delivery of the ownership documents. As Madam Yap did not deliver the ownership documents as requested, Eureka did not settle the remainder of the balance purchase price in the sum of RM447,037.67 on 05.10.2008.

Hence, the 1st SPA remained incomplete with both parties accusing each other of breaches of the 1st SPA. Pursuant to Clause 9 of the 1st SPA, Eureka had repudiated the 1st SPA and claimed for damages for all sums paid to Madam Yap pursuant to the 1st SPA.

[52] In view of our finding that Eureka was not entitled to specific performance as discussed above, in fact, there was no necessity for us to delve on other issues considered by the learned Judge. However, for the sake of completeness, we will attempt to discuss other issues raised by Eureka in its submissions.

[53] Based on the above-stated facts, we were of the view that, at most Eureka would only entitled to damages as a consequence for the repudiation of the 1st SPA by Eureka.

[54] We had shown above, by way of its pleadings, Eureka's claim against Madam Yap was premised on the alleged breach of the 1st SPA wherein Eureka had claimed for various reliefs such as damages for breach of the 1st SPA. However, what remained clear is that, it is not Eureka's case that Madam Yap was involved with the fraud and/or that the 2nd SPA was a sham involving Madam Yap, Phra Ruam, the conveyancing solicitors as well as the monks. In gist, Eureka had not pleaded a case of fraud against Madam Yap in its Statement of Claim but had raised the issue of fraud only in its Reply to Defence and Defence to Madam Yap's Counterclaim.

[55] The approach taken by Eureka is clearly in contravention with the provisions of Order 18 Rule 15 of the Rules of Court 2012 ("ROC") which had clearly stated that the plaintiff must specifically plead and identify its cause or causes of action against his opponent in the Statement of Claim. Order 18 rule 10 (1) of the ROC further supports the contention that the plaintiff must plead his cause of action against the defendant in the Statement of Claim and he is not permitted to raise new ground or claim which is inconsistent with his previous pleadings. In view of the above, Eureka is not entitled to raise the issue of fraud and/or that the 2nd SPA was a sham against Madam Yap without having to amend his Statement of Claim to include fraud as a cause of action against Madam Yap.

[56] Upon our evaluation of the evidence placed before the learned Judge, we found that, the conclusion made by the learned Judge went beyond Eureka's pleaded case against Madam Yap. The learned Judge had no basis either in law and in fact to arrive at that conclusion. Despite the fact that the claim against Madam Yap was of a very serious nature, Eureka did not see it fit to lodge a police report of the same. In fact, in cross-examination, PW1 had admitted that, as there was no proof of the alleged fraud, Eureka did not lodge a police report. Notwithstanding the above, the learned Judge had ruled that a case against fraud had been made out against Madam Yap and/or Phra Ruam or even against the conveyancing solicitors and/or the monks who were not even cited as parties in the suits.

[57] We observed that Eureka had attempted to drag in parties who were not cited in its pleadings with the alleged claim of fraud and/or the alleged sham 2nd SPA entered into between Phra Ruam and Madam Yap. This is obviously not permitted by the law and had caused serious injustice to these non-parties, the conveyancing solicitors as well as the monks.

[58] In support of this we would rely on the case of ***Metramac Corporation Sdn Bhd v Fauziah Holding Sdn Bhd [2007] 4 CLJ 725 and Om Prakash Chautala v Kanwar Bhan & Ors [2014] Indlaw SC 62*** which cases had held that it is inappropriate and unfair for findings to be made against the persons who are not made parties in a claim, without affording those persons the opportunity to rebut the same. Justice would demand that those persons against whom some adverse findings had been made out and/or in the event *mala fide* had been imputed must be given the right to state their cases. Otherwise their basic natural justice had been infringed.

[59] Learned Counsel for Phra Ruam too had filed his written submission which we had perused and considered. In essence, the points raised were similar to the points highlighted by learned Counsel for Madam Yap. In order to save judicial time and for want of duplicity, we proposed not to discuss the same herein. Further, at the outset, learned Counsel for Phra Ruam had also indicated his intention to rely on his written submissions filed herein. Learned Counsel too had at the outset indicated his intention to adopt the submissions of learned Counsel for Madam Yap and prayed for Phra Ruam's appeal to be allowed as prayed with costs.

[60] On the totality of the evidence and the facts as presented before the learned Judge, and noting that specific performance is an equitable remedy, we found that this was not a proper case for specific performance to be granted to Eureka.

CONCLUSION

[61] Having examined the pleadings, the notes of proceedings, and having heard the respective learned Counsel, we found that the learned Judge had not given sufficient judicial appreciation of the evidence both testimonial and documentary as well as regard to the established principles of law concerning the cause of action premised of breach of contract and fraud. For the reasons we discussed above, we were constrained to hold that the learned Judge had failed to judicially appreciate the evidence and/or the law presented before her so as to render her decision plainly wrong and upon curial scrutiny it merits our appellate intervention. Hence, we unanimously allowed the appeals filed by Madam Yap to the extent we discussed above with no order as to costs. We had also allowed Phra Ruam's appeal against the decision of the learned High Court Judge dated 30.09.2015 with costs and the orders of the learned Judge were hereby set aside to reflect the decision of this Court as stated above. Eureka's claim for damages for breach of contract against Madam Yap as per its claim was also allowed and we ordered the full refund of all monies due to Eureka under the 1st SPA with costs of

RM10,000.00 subject to allocator fees. We also allowed Phra Ruam's appeal against Eureka with no order as to costs. The deposit is refunded to the Plaintiff.

signed

(ASMABI BINTI MOHAMAD)
Judge
Court of Appeal, Malaysia

Dated: 10th November 2017

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