

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
(BAHAGIAN SIVIL)

GUAMAN NO.: BA-22NCvC-187-05/2021

ANTARA

LADANG VENU (M) SDN. BHD.
(No. Syarikat: 915085-D)

– PLAINTIFF

DAN

D PRISTINE MEDINI SDN. BHD.
(NO. SYARIKAT: 984932-H)

– DEFENDANT

GROUND OF JUDGMENT

Introduction

[1] The Plaintiff has bought 2 parcel of condominium units of Small Office Flexible Occupancy (SOFO) towers from the Defendant.

[2] The Plaintiff's claims are *inter alia* for the following:

- that the Defendant has allegedly breached the terms of the Sale and Purchase Agreement ("SPA") by failing to deliver the



vacant possession of Units of condominium to the Plaintiff as per the SPA.

- that the issuance of Certificate of Completion and Compliance (“CCC”) in Form F1 (being a Partial Certificate of Completion and Compliance) for Tower 1 and Tower 2 was allegedly issued in breach of the terms of the SPA.
- that both of the SPA for Unit T2-18-07 and Unit T1-20-16A are rescinded and the Plaintiff is entitled to the return of all payment already made to the Defendant, inclusive of the sinking funds and the maintenance charges.
- that as a result of the breach by the Defendant, the Plaintiff is allegedly entitled to award of damages and interests from the Defendant.

[3] The overview of the case as per the Plaintiff’s version is as follows:

- (a) Mr. Venadurai A/L Kanniah is the director for the Plaintiff’s company. He went to the Defendant’s Sales Gallery in Iskandar Puteri, Johor Bharu.
- (b) at all material times, the Defendant’s Sales Representative who had given a brief representation on all the potentials guaranteed from a mixed-used commercial development known as d’PRISTINE @ MEDINI, the well-equipped facilities and the strategic location of the development. The Defendant’s Sales Representative also gave Mr. Venadurai



A/L Kanniah the brochures, pamphlets and a small-scale model of how the entire development will look like upon its completion.

- (c) on 26-6-2014, the Plaintiff and the Defendant signed the SPA for the unit known as T2-18-07 (“the T2-18-07 SPA”) wherein the Plaintiff agreed to purchase and the Defendant agreed to sell this parcel unit for the price of RM979,640.00.
- (d) on 11-9-2014, the Plaintiff and the Defendant signed the SPA for the unit known as T1-20-16A (“the T1-20-16A SPA”) wherein the Plaintiff agreed to purchase and the Defendant agreed to sell this parcel for the price of RM647,410.00.
- (e) the Plaintiff had paid the full purchase of the 2 properties including the sinking fund.
- (f) on 22-1-2019, the Defendant sent a letter to the Plaintiff to notify the Plaintiff that the CCC has been issued for the parcel T2-18-07 and that the vacant possession is ready to be delivered (“the T2-18-07 letter”).
- (g) on 4-3-2019, the Defendant sent a letter to the Plaintiff to notify the Plaintiff that the CCC has been issued for the parcel T1-20-16A and that the vacant possession is ready to be delivered (“the T1-20-16A letter”).

Hereinafter collectively referred to as “the said Letters”).



- (h) according to both of the SPA, the Defendant is required to obtain the CCC in accordance to the Building Plan.
- (i) Clause 26 Manner of Delivery of Vacant Possession provides that such possession shall not give the Purchase the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the CCC is issued.
- (j) the Defendant failed to obtain the CCC for the Building, and instead, have only obtained a partial CCC for both of the Units.
- (k) the Defendant has yet to complete the office block, the hotel and the shopping complex as stated in the Building Plans.
- (l) the Plaintiff made complaints with the Defendant but the Defendant did not provide any explanation regarding their failure to complete the whole of the mixed-use commercial development based on the Building Plans.
- (m) until to date, the Defendant still has not secured any investors in respect of the mall, hotel and theme parks.

[4] The overview of the case as per the Defendant's version is as follows:

- (a) the Plaintiff has entered into separate SPA with the Defendant for the purchase and construction of 2 units under a project known as D'Pristine @ Medini ("Project") which is a mixed-development project situated at HS(D) 537369 PTD 199694,



Mukim of Pulai District of Johor Bahru, State of Johor. Details of such purchases are as follows;

<i>DATE OF AGREEMENT</i>	<i>UNIT NO.</i>	<i>TOWER</i>
26.6.2014	T2-18-07 ("Unit T2-18-07")	Tower 2
11.9.2014	T1-20-16A ("Unit T1-20-16A")	Tower 1
Collectively referred to as the "SPA"		

- (b) the Project being a mixed development project consists of multiple structures and phases. Of which, all of the units bought by the Plaintiff are situated in Tower 1 and Tower 2 respectively.
- (c) it was agreed in the SPA that the vacant possessions of the Plaintiff's units shall be delivered within 54 months from the date of agreement. As such, the Defendant has delivered the vacant possession of both Unit T2-18-07 and Unit T1-20-16A to the Plaintiff on 22.1.2019 and 4.3.2019 respectively. It must be brought to this Court's attention that the delivery of vacant possession of both units were accordingly admitted by the Plaintiff in its pleading.



- (d) the Certificate of Completion and Compliance (“CCC”) in Form F1 dated 30.10.2018 has been issued by the architect which certified the complete construction of the partial part of the Project, including inter alia, Tower 1 and Tower 2. The CCC was issued in accordance to the relevant guidelines issued by the Lembaga Arkitek Malaysia as well as according to the Undang-Undang Kecil Bangunan Seragam Johor 1986 (“UUKBSJ”).
- (e) as the phase for Tower 1 and Tower 2 was completed ahead of the other remainder phases of the Project, it was legally incumbent for the CCC in Form F1 to be issued to specifically certify the full completion of Tower 1 and Tower 2 (i.e. partial portion of the Project). Upon the approvals and confirmation of all the local authorities (*vide* Form G1-G21), both Tower 1 and Tower 2 has deemed been completed by the Defendant.
- (f) despite receiving the full and complete delivery of vacant possession of both of the Plaintiff’s units on 22.1.2019 and 4.3.2019, Unit T2-18-07 and Unit T1-20-16A respectively, the Plaintiff has still decided to commence this suit against the Defendant.



The Trial

Issues to be tried

[5] Enclosure C filed by the learned counsel for the Plaintiff stated the issues. The issues are –

- (a) *sama ada terdapatnya kemungkiran kontrak oleh Defendan di bawah SPA?*
- (b) *sama ada Defendan telah memberi representasi untuk membina dan/atau membangunkan Projek tersebut berdasarkan kelulusan the Building Plans daripada pihak berkuasa; Plaintiff telah membeli 2 unit sebagaimana yang dicerminkan dalam tajuk Projek tersebut; dan Plaintiff telah didorong untuk membeli 2 unit tersebut sebab nilai tambahan dari Projek tersebut?*
- (c) *sama ada milikan kosong bagi 2 unit itu diserahkan pada 22-1-2019 dan 4-3-2022 seperti mana yang diperuntukkan dalam SPA?*
- (d) *sama ada Preamble (4) merupakan sebahagian daripada terma dalam SPA? Sekiranya benar, sama ada Defendan mematuhi?*
- (e) *sama ada CCC telah dikeluarkan mengikut kelulusan the Building Plans daripada pihak berkuasa?*



- (f) sama ada Defendan dikehendaki menyempurnakan blok Pejabat, Hotel dan Pusat membeli belah bersama dengan penyempurnaan 2 unit yang dibeli oleh Plaintiff?
- (g) sama ada penyempurnaan sebahagian daripada the Building Plans daripada pihak berkuasa iaitu Fasa 1, Fasa 2 dan Fasa 3 adalah mencukupi dan memadai bagi Defendan mematuhi obligasi atau janjinya kepada Plaintiff?
- (h) sama ada Defendan menjalankan obligasinya dalam kedua-dua SPA dengan sempurna?
- (i) sama ada Plaintiff berhak untuk membatalkan 2 SPA dan menuntut segala bayaran yang dibayar oleh Plaintiff, termasuk faedah bagi pembelian 2 unit, sinking funds dan maintenance charges?
- (j) sama ada Plaintiff berhak untuk menuntut ganti rugi am dan/atau ganti rugi khas terhadap Defendan?
- (k) sama ada terdapat keperluan bagi Defendan untuk melampirkan keseluruhan the Building Plans bagi Projek tersebut di bawah First Schedule SPA, dan/atau memadai bagi Defendan untuk melampirkan the Building Plans bagi 2 unit yang dibeli oleh Plaintiff sahaja?



- (l) sama ada klausa 25(1) dan klausa 26(3) SPA perlu dibaca secara bersama dan menyeluruh dengan Preamble (6) SPA?

The Decision

[6] On 31-3-2023, the Court had dismissed the Plaintiff's claims and decided as follows:

“KEPUTUSAN BICARA PENUH

[1] *Tuntutan Plaintiff (Plf) terhadap Defendan ialah untuk –*

- a) *Perjanjian Jual Beli 2 Parcels iaitu T2-18-07 dan T1-20-16A yang dimasuki oleh Plaintiff dan Defendan dibatalkan sebab Sijil Penyempurnaan dan Pematuhan tidak diperoleh Defendan.*
- b) *Defendan mengembalikan segala pembayaran kepada Plaintiff termasuk “sinking funds” dan “maintenance charges” yang telah dibayar oleh Plaintiff bagi 2 Parcels tersebut dalam masa 7 hari dari tarikh Perintah ini.*
- c) *ganti rugi am dan/atau ganti rugi khas ditaksirkan.*
- d) *faedah pada kadar 8% setahun ke atas jumlah RM647,410.00 dari tarikh penyerahan milikan kosong iaitu 9-8-2019 sehingga tarikh penghakiman.*



- e) *faedah pada kadar 8% setahun ke atas jumlah RM979,640.00 dari tarikh penyerahan milikan kosong iaitu 9-8-2019 sehingga tarikh penghakiman.*
- f) *faedah pada kadar 5% setahun ke atas jumlah RM647,410.00 [termasuk faedah di perenggan (d)] dari tarikh penghakiman sehingga penyelesaian penuh.*
- g) *faedah pada kadar 5% setahun ke atas jumlah RM647,410.00 [termasuk faedah di perenggan (e)] dari tarikh penghakiman sehingga penyelesaian penuh.*
- h) *faedah atas ganti rugi diberikan pada kadar 5% setahun dikira dari tarikh 9-8-2019 sehingga penyelesaian penuh ganti rugi yang diberikan menurut seksyen 11 Akta Undang-Undang Sivil 1956.*
- i) *kos tindakan.*
- j) *relief lain dan/atau perintah selanjutnya yang dianggap wajar dan berpatutan oleh Mahkamah ini.*



[2] *Isu yang dihidkan –*

- a) *sama ada Defendan memberi representasi kepada Plaintiff bahawa Defendan akan membina d'Prestine @ Medini berdasarkan kepada the Building Plans daripada Pihak Berkuasa?*
- b) *sama ada 2 Parcels sebagaimana dalam Perjanjian-Perjanjian dibina berdasarkan butiran Perjanjian dan kelulusan the Building Plans daripada Pihak Berkuasa?*
- c) *sama ada Defendan gagal, enggan atau cuai untuk mendapatkan Certificate of Completion and Compliance for the Building (CCC)?*
- d) *sama ada Defendan gagal menyempurnakan blok pejabat hotel dan pusat beli sebagaimana Pelan Rancangan Bangunan yang menjadi sebahagian daripada Perjanjian SPA?*

Analisa Keterangan Lisan dan Dokumentar selepas Bicara Penuh & dapatan Mahkamah

[3] *Dalam perbicaraan, Mahkamah ini telah mendengar keterangan saksi-saksi Plaintiff dan Defendan.*



[4] Keterangan Defendan menyatakan bahawa 2 Parcels yang dibeli oleh Plaintiff telah diserahkan milikan kosong pada 22-1-2019 dan 4-3-2019.

[5] Persoalan mengenai penyempurnaan keseluruhan Projek adalah tertakluk kepada Pelan Asal Projek yang diluluskan oleh Pihak Berkuasa Tempatan. Defendan telah menyiapkan dan menyempurnakan Tower 1 dan Tower 2 di mana terletaknya 2 Parcels yang dibeli oleh Plaintiff.

[6] Mahkamah mendapati atas imbangan kebarangkalian, Plaintiff gagal membuktikan mengenai salah representasi bagi isu “mixed-used commercial development” yang dicerminkan (reflected) dalam tajuk Projek sehingga “mendorong” Plaintiff membeli 2 Parcels tersebut. Keterangan (semasa disoal balas) SD1 iaitu Law Boon Hee (Dato’) menyatakan bahawa indoor theme park, interlink with SOHO dan mall memang ada tetapi belum siap.

[7] Mahkamah dengan ini menolak tuntutan Plaintiff dengan kos sebanyak RM18,000.00 (tertakluk kepada fi alokatur) dibayar oleh Plaintiff kepada Defendan.”.

[7] Unhappy and aggrieved with my decision the Plaintiff appeal to the Court of Appeal



Evaluations and Findings of this Court

[8] The full trial was conducted and heard on 30-1-2023, where the Plaintiff has called its only witness that is Mr. Venadurai A/L Kanniah who is also the director of Ladang Venu (M) Sdn Bhd. For the Defendant, there are 2 witnesses that are Mr Law Boon Hee (Dato'), director of the Defendant and Mr. Saifulazlan bin Shah, an architect.

[9] The evidences by Plaintiff's witness are –

- the Plaintiff had bought 2 units of properties from the Defendant which are unit T2-18-07 and unit T1-20-16A at d'Pristine @ Medini, Iskandar Puteri, Johor.
- Mr. Venadurai A/L Kanniah was impressed by the presentation and had received the brochures, pamphlets and was shown small scale model of how the entire development will look like upon its completion.
- Mr. Venadurai A/L Kanniah was shocked at the price range and enquired further why it was so expensive compared to the other similar properties in the vicinity of Iskandar Puteri.
- the Defendant's sales representative informed Mr Venadurai A/L Kanniah that the price range is quite high but further explained it was due to the value-add factors such as the facilities that are proposed to be built surrounding the properties such as the components which includes 2 SOFO towers, Grade A Office Tower, lifestyle mall and trendy hotel.



The property also is built around landmark properties such as Legoland Malaysia, Urban wellness centre, Gleneagles Medini Hospital and other places. Considering the completion of the mix development will definitely increase the value of the properties concerned, it was suggested to the Plaintiff to purchase both units.

- the Plaintiff has 4 other properties (residential) in the vicinity.
- the Plaintiff had paid the full price for the 2 units including the sinking fund.
- the Plaintiff had received the letters from the Defendant regarding the delivery of vacant possession for the 2 units in which the Defendant had duly informed that the Project was completed and CCC had been obtained and was enclosed in the letters.
- the Plaintiff refused to accept vacant possession for the 2 units because –
 - (a) the main entrance to d’Pristine @ Medini was uncompleted/barricaded. Instead, there was an access road (sort of back lane) to the SOFO Towers.
 - (b) the lobby/entrance to SOFO Tower 1 was partially completed with construction work still in progress.



- (c) the lobby/entrance to SOFO Tower 2 was closed/barricaded.
- (d) the lift to SOFO Tower 1 does not have any approvals displayed (usually all lifts do have such approvals).
- (e) there is no TNB substation building at d'Pristine @ Medini instead TNB power supply was connected to development site using a container (temporary structure).
- (f) the Plaintiff had made complaint to the Defendant, architect and the local authorities regarding the non-completion of d'Pristine @ Medini but the Defendant issued notice of vacant possession claiming completion.

Whether the Defendant has failed to complete d'Pristine @ Medini and deliver the 2 units to the Plaintiff?

[10] The Plaintiff aver that the properties (2 units) bought from the Defendant are non-HAD property therefore the parties should rely on the terms of the contract i.e. the SPA.

[11] The refusal to accept the vacant possession of the 2 units is due to “until to date, the Defendant still has not secured any investors in respect of the mall, hotel and theme parks”.



[12] The learned counsel for the Plaintiff in the cross examination of the First Defendant witness (DW1) asked about the advantages of having the unit together with the indoor theme park and hotel.

[13] The testimony by DW1 admitted that the Defendant yet to finish it because they cannot find the suitable investor in order to finance the Project. DW1 also denied that the Defendant's failure to build the indoor theme park and hotel means that the Project is another abandoned project. DW1 had testified "I do not agree to this because we still looking the hotel operator, still studying in this hotel operator and also the mall whether to be theme park also we are looking direction of furniture mall, still studying by our marketing, cannot consider as totally abandon the project because we still owned this project".

[14] The learned counsel for the Plaintiff in paragraphs 19 and 20 of its written submission submitted that the Defendant has breached the terms as stipulated in the SPA on the reasons that the vacant possession shall be delivered to the purchaser (Plaintiff) within 54 calendar months from the date of the SPA and that the time shall be the essence of the contract; and in clause 26 of the SPA provides the manner of delivery of the vacant possession in respect of the parcel to the purchaser.

[15] In reading and analyzing the evidence and documents before me, and also the written submission this Court finds that the Defendant had successfully deliver the vacant possessions for both Unit T2-18-07 and Unit T1-20-16A accordance to the terms agreed under the SPAs entered between both parties. The vacant possessions of both Unit T2-18-07 and Unit T1-20-16A were already delivered and completed by the Defendant



on 22.1.2019 and 4.3.2019 respectively. Hence, the Defendant had complied with clauses 25 and 26 of the SPA.

Whether the Defendant has breach clause 26 (3) of the SPA?

[16] Clause 26(3) of the SPA provides –

“Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Completion and Compliance for the Building is issued.”.

[17] The Plaintiff contended that Defendant’s failure to deliver the 2 units together with the whole structure of the Building (the hotel, mall and the theme parks) had breached Clause 26(3).

[18] The learned counsel for the Defendant submits that –

“... the Plaintiff has misinterpreted clause 26 of both SPAs. The true meaning of the requisite Certificate of Completion and Compliance of “the Building” under Clause 26(3) must be read together with the definitions enumerated under Preamble (6) of the SPAs.

[15] The simple reading of Preamble (6) explicitly defined the term ‘the Building’ to refer to the Floor Plan attached under the First Schedule of the respective Sale and Purchase Agreement.



[16] It is the Defendant's submission that the term "the Building" referred to in the SPAs has always been defined to refer NOT TO THE ENTIRE said Project but it only specifically refers to the portion of development indicated in the Floor Plan of the respective SPAs which has been shaded in green, i.e. Tower 1 and Tower 2 only.

[17] A simple and prima facie reading of the attached Floor Plan under the 1st Schedule of SPAs clearly reveals that the word "the Building" referred by the Defendant under clause 26(3) covers only the units and amenities bought by the Plaintiff in both Tower 1 and Tower 2, without making any reference to other portion of the said Project.

[18] The Defendant further submits that a proper reading of the SPAs sufficiently reveals that the requisite CCC under Clause 26(3) of the SPAs is actually referring to the CCC of the specific portion of the development stipulated in the Floor Plan (in this instance, Tower 1 and Tower 2), and not for the entire completion of the said Project.

[19] Thus, it has always been understood and agreed between the parties that a partial CCC (in Form F1 issued by the architect) for Tower 1 and Tower 2 is the appropriate CCC for vacant possessions to be effectively and completely delivered to the Plaintiff.

[20] The Defendant further submits that the Plaintiff is ought to be estopped from denying ever receiving the delivery of vacant possession of the Plaintiff's units. In one breath, the Plaintiff vehemently claims that the Defendant has allegedly failed to deliver vacant possessions of the Plaintiff's units but on the same breath



the Plaintiff contradicts itself in alleging that the Plaintiff is entitled to the late delivery interest must be calculated from the date of the delivery of vacant possessions.

...

[25] It is important for both of clause 25(1) and 26(3) to be read together with all the other clauses in SPAs in order to avoid an isolated misinterpretation of the true terms of the agreement which were mutually agreed by both parties. It remains undisputed and agreed that the vacant possessions of both the Plaintiff's units have been perfectly delivered to the Plaintiff and as according to the terms enumerated under the respective SPAs."

[19] The dispute by the Plaintiff is because the vacant possessions of both the Plaintiff's units have been "imperfectly delivered" to the Plaintiff and not in accordance with the terms enumerated under the respective SPA. This Court finds that the assertions made by the Plaintiff is fatally wrong. The Defendant had successfully hand over and deliver the 2 units fully paid by the Plaintiff not in accordance with the terms enumerated under the respective SPA. For the "imperfectly delivered" is only the failure by the Defendant to deliver the 2 units together with the other amenities i.e. the mall, the hotel and the theme parks. The explanation by DW1 is clear and satisfactory. The construction of the mall, the hotel and the theme parks are in progress and the Defendant did not abandoned the Project.



[20] In **Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia** [2010] 6 CLJ 530, Yang Arif Suriyadi Halim Omar, JCA (Y.A as he then was) held “It is trite in civil cases that he who asserts must prove, and here the appellant is the asserting party... on that premise the appellant had failed to prove its case on a balance of probability.”.

[21] The architect that is the Second Defendant witness (DW2) who is an architect at MDP Associates Sdn Bhd been appointed and involved in the d'Pristine @ Medini Project in his testimony had explained clearly pertaining to the issue of CCC –

- (a) in DW2's witness statement (PSD-2), Answer to Q. No. 4:
Secara umumnya, saya menafikan kesemua dakwaan Plaintiff yang menyatakan Sijil Penyempurnaan dan Pematuhan bagi unit-unit Plaintiff tidak lagi diperoleh. Ini memandangkan telah terdapat satu Borang F1 bertarikh 30-10-2018 telah sesungguhnya dikeluarkan bagi mengiktirafkan bahawa bangunan terletaknya unit-unit Plaintiff iaitu Tower 1 dan Tower 2 telah disiapkan dan adalah selamat didiami.

Borang F1 adalah merupakan satu borang yang sah dan diiktiraf di sisi undang-undang untuk diambil kira sebagai satu sijil bagi mengiktirafkan penyerahan milikan kosong bagi unit-unit Plaintiff tersebut.

Saya sesungguhnya telah mengeluarkan Borang F1 selari dengan kelulusan oleh pihak-pihak berkuasa tempatan dan selari dnegan penyerahan Borang G1 hingga G2 sepertimana yang diperuntukkan oleh undang-undang.



Further, DW2 has answered Q. No. 5 as in PSD-2 as follows:

Dokumen tersebut adalah merupakan sesalinan Borang F1 bertarikh 30-8-2018 yang dimaksudkan di atas yang mana ianya telah dikeluarkan oleh Lembaga Arkitek Malaysia selari dengan peruntukan di bawah Undang-Undang Kecil 7, Undang-Undang Kecil Seragam Johor 1986 (“UUKBSJ”) dan perenggan 7 garis Panduan Lembaga Arkitek Malaysia yang relevan, Saya telah mengeluarkan Borang F1 secara sah berdasarkan undang-undang yang terpakai beserta kelulusan pihak-pihak berkuasa.

- (b) DW2 also in his answers to Q. No. 6 and No. 7 as in PSD-2 has stated that –

... Salinan-salinan Borang G1 hingga G21 beserta dokumen-dokumen sokongan yang relevan yang telah dikeluarkan selari dengan perenggan 7 Garis Panduan Lembaga Arkitek Malaysia (Pekeliling Am Bil. 2/20) yang mana Borang-borang tersebut adalah mustahak bagi mendapatkan kelulusan daripada semua pihak-pihak berkuasa tempatan (seperti Jabatan Bomba dan Penyelamat Malaysia, Majlis Bandaraya Iskandar Puteri, Indah Water Konsortium Sdn Bhd, Tenaga Nasional Berhad dan juga Telekom Malaysia) (“pihak-pihak berkuasa”) sebelum Borang F1 boleh dikeluarkan.



Borang F1 tersebut telah secara sah dikeluarkan bagi mengiktirafkan penyiapan bagi bangunan terletaknya unit-unit Plaintiff yang mana ianya hanya boleh dikeluarkan apabila kesemua syarat-syarat dan kelulusan pihak-pihak berkuasa diperoleh. Saya menyatakan bahawa ianya adalah amalan kebiasaan bagi arkitek untuk mengisukan Borang F1 memandangkan Borang F1 adalah merupakan dasar yang sah dikeluarkan bagi satu serahan milikan kosong yang sempurna bagi bangunan yang telah siap sebahagian.

Borang F1 yang telah dikeluarkan selari dengan peruntukan bagi mendapatkan kelulusan pihak-pihak berkuasa melalui Borang G1-G21 tersebut adalah selari dengan perenggan 7 Garis Panduan Lembaga Arkitek Malaysia (Pekeliling Am Bil. 2/20) yang mana saya sesungguhnya telah dipatuhi secara cermat dan hemat oleh saya selaku Arkitek yang dilantik oleh syarikat Defendan.

[22] DW1 was cross examination by the learned counsel for the Plaintiff particularly on the issuance of CCC and DW2's evidences are loud and clear in explaining to this Court about the Architect's Certificate certifying that the construction of the properties bought by the Plaintiff were duly completed and vacant possession of the properties were delivered.

[23] I accept that DW2 (the architect) may have a duty of care in law to the Plaintiff as purchaser. This is provided under the common law in instances the architect had acted negligently in designing the building or implemented the project that led to damage suffered by the purchasers. For example, if the design by the architect was so negligent that it led to



a disaster or collapse of a building, then a claim may be pursued against the architect. See **Chin Kok Woo & Ors v Sky Park Properties Sdn Bhd & Ors** [2022] 10 MLJ 153.

[24] The learned counsel for the Plaintiff did not cross examine DW2 in length to query about the CCC. This Court agree with and accept the evidence of DW2 and held that the validity of Form F1 as CCC should not be questioned. The Certificate issued by the Architect is valid. DW2 is the person who has the expertise and who has issued out Form F1 itself.

[25] The learned counsel for the Defendant submits that the lack of questioning on the Plaintiff's part against the architect proved that the Plaintiff is admitting to the truth of the statement contained under PSD-2 and further cited the Court of Appeal case of **Forest Steel Sdn Bhd v Iconic Gateway Sdn Bhd & Anor and another appeal** [2020] MLJU 563, which has held that –

“... the failure to cross-examine a witness amounts to an acceptance of the witness' testimony. The Court of Appeal said (at page 17 of 35):

[97] It is settled law that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (**Wong Swee Chin v Public Prosecutor** [1980] 1 LNS 138). Iconic is deemed to have accepted the evidence of PW2 and PW3 when they failed to cross-examine them on the issue of the preliminary works.”.



[26] To support its strong argument to convince this Court on the DW2's evidence, the learned counsel for the Defendant submits –

“[47] In another Court of Appeal decision in **Aik Ming (M) Sdn Bhd & Ors v. Chan Ching Chuen & Ors & Another Case** [1995] 3 CLJ 639, the Court has held as follows:

It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case... The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice... if he asks no question with regard to this, then he must be taken to accept the plaintiffs' account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he finished the evidence of his witness and when he has no further chance to meet the new case made which was never put and secondly, because subsequent testimony has no chance to be tested and corroborated.

[48] Thus, the Defendant humbly submits that the failure of the Plaintiff to cross examine SD2 on the validity of Form F1 as the CCC under the SPAs deemed the Plaintiff's acceptance to the validity and legibility of Form F1. It is also pertinent for the



Defendant to submit that the said Form F1 is also was marked as Part A during the trial.

[49] All the relevant documentation including notice of vacant possession have been forwarded to the Plaintiff to certify the completion of ONLY T2-18-07 and T1-20-16A. Therefore, the issuance of Form 1 is to certify that parcel T2-18-07 and T1-20-16A is eligible to be delivered to the Plaintiff.”.

[27] The learned counsel for the Defendant cited the case of **Chin Kok Woo & Ors v Sky Park Properties Sdn Bhd & Ors** (supra) regarding the legibility of Form F1, whereby the learned Judicial Commissioner. Kuala Lumpur High Court (as Y.A then was) has held as follows:

“[67] I find that what is important is that the principal submitting person...must certify (i) that all the technical conditions imposed by the local authority have been complied with; (ii) form G1 to G21 has been duly received by him and duly certified; (iii) all electrical services, access roads and all requirements thereunder have been provided and he certifies that the building has been constructed and completed to the best of his knowledge in accordance with the Act, applicable laws and approved plans.

...

[69] After considering the documents shown in the affidavit, I find that the first Defendant has shown that, although the title to the Form used is FORM F1, the architect has certified that



Menara Tower 2 was built in accordance with the requirements of section 25 to 28 of UBKS 1986. HE HAS CERTIFIED THAT THE SAID BUILDING IS FIT AND READY FOR OCCUPATION. Form G1 to G21 were reproduced by the first Defendant and the third Defendant with all the necessary documents showing water, electricity, and access to the building has been provided on 2-7-2018. Even in the Form utilized by the architect, HE HAD INDICATED THAT BLOCK MENARA 1 (SERVICE APARTMENT) 44 TINGKAT 319 UNIT IS SAFE AND FIT FOR OCCUPATION IN ACCORDANCE WITH THE UUKBS 1986.”.

[28] Even though the decision and principle decided in the case of **Chin Kok Woo** is not binding in this Court, my finding is that the Defendant has accordingly proved all requirements for the purpose of issuance of Form F1. The DW2 (the architect) has certified that all the technical conditions imposed by the local authority and the relevant authorities that in certifying Form F1, the Defendant had complied with and has been duly received and certified and all electrical services, access roads and all requirements thereunder have been provided. The units bought by the Plaintiff are perfectly completed.

[29] The learned counsel for the Defendant submits that –

“It is ridiculous for the Plaintiff to expect that no developer can hand over any portion of the building that has been completely constructed and deemed fit for occupation (by the local authority in a mixed development project) until the remainder portion of the same project are completed. This contention is simply absurd, impractical and would cause extensive delays in its purportedly



handover of the units purchased. Considering that there remains some remainder phases or parts of the said Project yet to be completed, the full Form F cannot yet be issued to the Plaintiff. Since only the phase for Tower 1 and Tower 2 were fully completed, Form F1 is the statutorily appropriate certification for the partial completion of a specific portion of the said Project and to deliver vacant possessions of the Plaintiff's Units to as accordance to the SPAs.”.

[30] For this argument, I find that the Plaintiff “grouchy” and filed this suit against the Defendant because the vacant possession of the 2 units delivered to the Plaintiff is not as per its “imagination” based on the brochure, pamphlets and the small-scale model of the entire development will look like upon its completion and the high prices the Plaintiff has to pay. However, after the testimony by the Defendant's director (DW1), the value of added factors such as the lifestyle mall, trendy hotel, theme parks inside the mall are all within the development of the Project and to be built surrounding the properties. Due to the financial constraints to find the investors, the “facilities that are proposed” are yet to be build and completed.

[31] The Plaintiff, especially its own director (Mr. Venadurai A/L Kanniah) not only had bought the 2 units from the Defendant, but that is the fact that the Plaintiff has 4 other properties (residential) in the vicinity and the Project also is built around landmark properties such as Legoland Malaysia, Urban wellness centre, Gleneagles Medini Hospital and other places. Considering the completion of the mix development will definitely increase the value of the properties concerned, as it was suggested to the Plaintiff to purchase both units by the Defendant's sales representative.



[32] The Plaintiff has failed to prove any misrepresentation made by the Defendant's sales representative. Mr. Venadurai A/L Kanniah has testified that he was impressed by the presentation held at the sales gallery by the Defendant's sales representative that he cannot recalled the name (but a female sales representative). The Plaintiff on its own will and as a "frequent" purchaser of the property in Johor Bharu already can see the future development of the Project d'Pristine @ Medini, Iskandar Puteri, Johor.

[33] Upon the inspection, the Plaintiff found that the partially completed building was poorly constructed and that the Plaintiff had refused to accept the vacant possession as stated in paragraph 34 of the Plaintiff's written submission that are (i) the main entrance of the d'Pristine @ Medini was incomplete and/or barricaded and only an access road that tool like back lane to the SOFO Towers; (ii) the lobby or entrance to SOFO Tower 1, was partially completed with construction work still in progress; (iii) the lift to SOFO Tower 1 do not have any approval displayed; (iv) there is no TNB Substation building, are not pleaded.

[34] The allegation on the defects as to the main entrance, lobby, lift etc. can be remedied under the clause 16 (Infrastructure and Maintenance), clause 17 (Common Facilities and Services); and clause 28 (Defect Liability Period). Since it is unpleaded, the Plaintiff's complaints pertaining to these allegations are unfounded.

[35] The Plaintiff also had claimed for the LAD (Liquidated Ascertained Damages) due to the failure to deliver the vacant possession of the 2 units pursuant to clause 25 (2) of the SPA. In the written submission, the learned counsel for the Plaintiff submits –



“[138] Therefore, the Plaintiff respectfully submits that in the event rescission of contract cannot be succeed, considering that the Defendant had failed to properly deliver vacant possession of the said parcels up until today, this Honourable Court ought to grant the Liquidated Ascertained Damages (LAD) upon the Plaintiff as a form of compensation and the Plaintiff shall file further action before the Court for the damages to be properly assessed.”.

[36] The reliefs sought by the Plaintiff in its statement of claim mainly to cancel, terminate and rescind the SPA signed with the Defendant and in consequence to that, the Plaintiff wants any payments made to the Defendant including the sinking funds and the maintenance charges paid to the Defendant for the 2 units; general and special damages; interest and costs. The claim for LAD is out of tangent and an attempt to revisit the Plaintiff's claim. Again, the submission as in paragraph [138] should not be entertained.

[37] After analyzing and assessing both parties' evidences vide the witnesses and documentary evidences, it is clear that the Plaintiff had failed to prove its case pursuant to section 101 of the Evidence Act 1950.

[38] The Defendant had successfully furnished all the necessary documents to prove that Form F1 is a valid CCC for the purpose of delivery of vacant possessions of the Plaintiff's 2 units; the Defendant had properly adhere to the contents stipulated in the SPA; and there is no misrepresentation towards the Plaintiff.



Conclusion

[39] For the foregoing reasons, it is my judgment that having evaluated the evidence adduced at trial, I find that the Plaintiff has failed to establish its claims against the Defendant. As such, I dismissed the Plaintiff's claims with costs (subject to allocator fee).

Dated: 15 May 2022.

Rozi Bainon

(ROZI BINTI BAINON)
Judicial Commissioner
High Court NCvC12
Shah Alam

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