IN THE COURT OF APPEAL OF MALAYSIA
HOLDEN IN KUCHING, SARAWAK
(APPELATE JURISDICTION)
CIVIL APPEAL NO.Q-02(W)-809-04/2016

BETWEEN

B.I.G. INDUSTRIAL GAS SDN BHD … APPELLANT
(Company No. 62396-A)

AND

PAN WIJAYA PROPERTY SDN BHD … RESPONDENT
(Company No. 982375-W)

HEARD TOGETHER

CIVIL APPEAL NO.Q-02(A)-810-04/2016

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B.I.G. INDUSTRIAL GAS SDN BHD … APPELLANT
(Company No. 62396-A)

AND

PAN WIJAYA PROPERTY SDN BHD … RESPONDENT
(Company No. 982375-W)

(In the Matter of Suit No. BTU-22-5/9-2013 (consolidated with Originating Summons No. BTU-24-10/7-2013) in the High Court in Sabah and Sarawak at Bintulu

Between

Pan Wijaya Property Sdn Bhd (Company No. 982375-W) … Plaintiff

And

B.I.G. Industrial Gas Sdn Bhd (Company No. 62396-A) … Defendant)

CORAM

MOHD ZAWAWI SALLEH, JCA
AHMADI HAJI ASNAWI, JCA
KAMARDIN HASHIM, JCA

JUDGMENT OF THE COURT

[1] These two related appeals concern the alleged refusal of the respondent/defendant to complete a transaction for the sale of a parcel of land situated at Kidurong Road, Bintulu and described as Lot 2072 Block 26 Kemena Land District ("the said land").

Antecedents

[2] These appeals emanate from the following two High Court cases, namely –

(i) High Court Suit No.BTU-22-5/9-2013 (the summons) and now referred to as Civil Appeal No.Q-02(W)-809-04/2016; and

(ii) High Court Originating Summons No.BTU-24-10/7-2013 (the Originating Summons to remove caveat) and now referred to as Civil Appeal No.Q-02(A)-810-04/2016.

[3] Before the High Court, these two cases were consolidated and heard together.

[4] The claim of the appellant/plaintiff in the High Court action (High Court Suit No.BTU-22-5/9-2013) were essentially for –

(a) specific performance of the sale and purchase agreement ("SPA");

(b) all necessary and consequential accounts, directions and inquiries;

(c) further or alternatively, damages for breach of contract with assessment of damages on the consequential loss and damages and interest thereon;

(iv) interest; and

(v) costs.

[5] In BTU-24-10/72013, the respondent/defendant applied to remove a caveat lodged by the plaintiff and for damages for the alleged wrongful lodgement of the caveat.

[6] After full trial, on 18.3.2016, the learned High Court Judge

made the decision in open court and further clarified the decision on 24.3.2016. The learned High Court Judge made the following orders –

(a) the appellant/plaintiff's action in High Court Suit No.BTU-22-5/9-2013 be dismissed with costs;

(b) an order of specific performance of the SPA shall not be granted against the respondent/defendant;

(c) the respondent/defendant's counterclaim in Originating Summons No. BTU-24-10/7-2013 be dismissed;

(d) damages for breach of the SPA is awarded to the respondent/defendant and the Senior Assistant Registrar shall assess the damages either under section 75 of the Contract Act 1950 or Clause 6 of the SPA; and

(e) Global costs of RM55,000.00 is awarded to the appellant/plaintiff in respect of Suit No.BTU-22-5/9-2013 and Originating Summons No.BTU-24-10/7-2013.

[7] Dissatisfied with the impugned decision, the appellant/plaintiff appealed against the whole of the said decision and the respondent/defendant appealed against the part of the decision where the learned High Court Judge refused to grant an order for the specific performance of the contract for the purchase of the said land and the decision of the learned High Court Judge in ordering the damages to be assessed either under section 75 of the Contracts Act 1950 or Clause 6 of the contract at the clarification on 24.3.2016. Hence, these appeals before us.

[8] For ease of reference, in this judgment, the parties will be referred to as they were at the High Court.

Facts of the Case

[9] The facts of the case are relatively straightforward and can be summarised within a brief compass.

[10] The defendant is the registered proprietor of the said land. The said parcel was for sale. The plaintiff was interested in buying the said land.

[11] Both the defendant and the plaintiff entered into a SPA dated 26.6.2012 where in terms whereof the defendant agreed to sell the said land for the price of RM3,100,000.00. The plaintiff paid RM620,000.00 as deposit and part payment upon the signing of the SPA and the balance to be paid within 3 (three) months upon receiving the consent in writing for the transfer of the said land by the Director of Lands and Surveys Sarawak.

[12] By Clause 6 of the SPA, the parties agree that in the event the defendant fails, refuses or unable to execute the transfer of the said land in the manner stated in the SPA in favour of the plaintiff, the plaintiff is entitled to treat SPA as cancelled, null and void as by mutual consent and the defendant shall refund the said RM620,000.00 and thereupon the defendant shall pay the pre-estimated liquidated damages. Parties shall have no claim for costs, compensation or specific performance.

[13] It is a common ground that both parties were aware of the special conditions that the said land cannot be transferred without the

consent in writing of the Director of Lands and Surveys, Sarawak.

[14] Pursuant to Clause 8 of the SPA, the plaintiff had lodged a caveat against any dealing of the said land.

[15] Written application for consent of the Director of Lands and Surveys, Sarawak was made by the common solicitor acting for both the defendant and the plaintiff, Messrs Kadir, Wong, Lin & Co., Advocates (Bintulu).

[16] On 12.3.2013, the Director of Lands and Surveys, Sarawak rejected the said application by stating that the application is "*adalah tidak dapat dipertimbangkan*".

[17] By a letter dated 28.3.2013, issued by the defendant's advocates, the plaintiffs was informed by the defendant that the SPA cannot be completed and treated the SPA as void and offered to refund the said RM620,000.00 by a cheque to the plaintiff.

[18] By a letter dated 2.4.2013, issued by the plaintiff's advocates, the plaintiff refunded the said cheque to the defendant, and rejected the defendant's repudiation of the SPA. The plaintiff pleaded that at all the material times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA.

[19] The plaintiff vide a letter dated 18.3.2013, informed the defendant that it rejected a repudiation of the SPA and was prepared to pay the balance of the purchase price to the plaintiff prior to the necessary transfer of the said land if the defendant could duly execute all the necessary instruments and documents, including

Memorandum of Transfer, Power of Attorney with full powers to do all matters as the registered proprietor could do personally and the written permission to appeal or re-submit the application for consent of the transfer of the said land but this was rejected by the defendant.

[20] By a letter dated 20.5.2013, the common solicitor acting for both the plaintiff and the defendant, Messrs Kadir, Wong, Lin & Co. informed the defendant that the plaintiff would like to secure permission from the defendant, to appeal for a consent of the Director of Lands and Surveys, Sarawak, for the transfer of the said land, and that the plaintiff was confident that the appeal would meet the approval requirement of the Director of Lands and Surveys, Sarawak but the defendant refused to permit the plaintiff, to appeal to the said Director.

[21] The plaintiff then filed High Court Suit No. BTU-22-5/9-2013.

The Judgments Below

[22] The learned High Court Judge set out three (3) key issues for decision as proposed by the defendant –

> "(i) whether the contract for sale of the said land has become impossible to perform and was therefore frustrated and void for the reason that the application by Messrs Kadir Wong Lin & Co Advocates vide its letter dated 30 January 2013 for consent for the transfer of the title of the said Land (Lot 2072 Block 26 Kemena Land District) was rejected on the ground that the application "*tidak dapat dipertimbangkan*";

(ii) whether the plaintiff is entitled to specific performance of the contract or damages for breach of contract or otherwise; and

(iii) whether the caveat lodged by the plaintiff on Lot 2072 Block 26 Kemena Land District vide Land Instrument L703/2013 registered on 8.2.2013 at the Bintulu Land Registry Office ought to be removed.".

[23] Regarding the first issue, the learned High Court Judge held that the defendant had failed to prove that the contract for sale of the said land has become impossible to perform and was therefore frustrated. The learned High Court Judge reasoned that both parties were fully aware of the requirement of the consent of the Director of Lands and Surveys, Sarawak and therefore there is no change of circumstances rendering a fundamental or radical change on the obligations originally undertaken and the rejection of the defendant's application for the requisite consent does not make the performance of the SPA impossible as the defendant can still file a proper appeal against the said decision or re-file proper application without any erroneous particulars but the defendant chose not to do so.

[24] This is an important aspect of the case and it is appropriate therefore to set out what the learned High Court Judge said (see pages 31-32 of R/P, Volume I Part A Record of Appeal) –

> "32. From the evidence adduced, this Court finds that the initial appeal by the Defendant for the requisite consent was flawed in that the material particulars of the said Land was wrong and that the application was sent to the wrong party. The Defendant ought to have either resubmit another application containing the correct

particulars of the said Land and to the proper person or lodged and appeal after rectifying the defects in the initial application. The Defendant decided or omitted to do either. Instead the Defendant then proceeded to repudiate the SPA, relying on frustration. This showed that the Defendant had no intention to complete the SPA. Furthermore there was evidence adduced, to show that chances of an appeal succeeding is high.

33. This Court finds that from the testimony in cross-examination of DW1 - Lau Keat Hoo, he was fully aware of the fact that there was no problem of getting consents for the transfer of lands used for industrial purposes as all industrial lands in Bintulu contained similar special conditions in Bintulu and it is a routine application/procedure for Bintulu conveyancing solicitors, for such lands. ...".

[25] As to the second issue, the learned High Court Judge rejected the argument put forward by the learned counsel for the plaintiff that as there was a binding agreement for the said land between the parties and at all the times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA, specific performance of the agreement ought to be granted against the defendant in Suit No.BTU-22-5/9-2013.

[26] His Lordship's reasons for rejecting this argument were as follows –

"51. In *Kong Ming Finance Corp Bhd v. Topical Habitat Sdn Bhd [1990] 3 MLJ 243*, whereby Chong Siew Fai J (as he then was) held as follows:-

> “In my opinion, the court ought not lend its hand to grant the relief as sought in protection of an interest arising from a dealing the creation of which requires express consent which had not been obtained, and the performance of which relief, if granted and if capable of having it enforced upon the vendor as the registered landowner to perform, would contravene an express provision of the law and render the registered landowner liable to committing an offence and his land liable to forfeiture. In other words, there can, in my view, be no question of the alleged contractual right of the applicant being capable of specific performance since an order of specific performance as claimed would, in the circumstances, be tantamount to authorizing the applicant to enforce or to compel the vendor or his estate (if compellable) or to compel the borrower to do something which is prohibited by the document of title relating to the said land, thereby rendering the registered landowner liable to be guilty of an offence or the said land liable to forfeiture under s 33 of the Land Code.”

52. Since the consent of the Director of the Lands and Survey Department is required for the transfer of the said Land and applying the reasoning of Chong Siew Fai J (as he then was) in the case of *Kong Ming finance Corp Bhd v. Tropical Habitat Sdn. Bhd* [supra] where his Lordship held that the court ought not to lend its hand to grant relief which requires express consent which had not been obtained, and should the relieve be granted, the performance of which relief, would contravene an express provision of the law, this Court shall not grant an

order of specific performance of the SPA against the Defendant.".

[27] Concerning the third issue, the learned High Court Judge concluded that based on the evidence adduced at trial, the plaintiff has proved its interests in the said land which is caveatable by virtue of the written contract i.e. the SPA which the parties have mutually agreed to be bound by it. His Lordship referred to Clause 8 of the SPA which stipulates as follows –

> "The Vendor hereby agrees and allows the Purchaser to lodge a Caveat against the said Land upon signing of this Agreement.".

[28] In support of his decision, the learned High Court Judge relied on the cases of ***Macon Engineers Sdn. Bhd. v. Goh Hooi Yin*** **[1976] 2 MLJ 53** and ***Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd*** **[2007] 7 MLJ 23**.

The Appeal
No.Q-02(W)-809-04/2016

[29] The principal issue in Appeal No.Q-02(W)-809-04/2016 is whether the learned High Court Judge erred in holding that there is no frustration of the contract. Learned counsel of the defendant has spiritedly argued that the transfer of the said land is subject to the consent of the Director of Lands and Surveys Sarawak and there is no provision in the SPA to cater or provide for the event when the Director refused to grant consent or rejected the application for a consent.

[30] Additionally, learned counsel submitted that the learned High Court Judge erred both in fact and law in ruling that there is no frustration of contract when in fact the request by the defendant for an appeal against the decision of the Director of Lands and Surveys Sarawak cannot possibly be agreed by the defendant as the terms imposed by the defendant for the appeal is offensive and beyond the scope of the contract. The offensive conditions placed on the defendant were stated in the plaintiff's advocates' letter dated 18.3.2014 which stated that –

> "In order to resolve the problem if any, we are instructed that our client is prepared to pay the balance of the purchase price **provided however that you shall duly execute all the necessary instruments and documents including the Memorandum of Transfer, Power of Attorney with full powers to do all matters as the registered proprietor could do personally** and the written permission to appeal or re-submit the application for consent of the transfer of the said Property in favour of our client.". (Emphasis added).

[31] Learned counsel also argued that the plaintiff had clearly intended to subject the defendant to an endless string or process of appeals and re-submission when in fact frustration had already occurred when the Director of Lands and Surveys Sarawak rejected the consent on 12.3.2013. Learned counsel posited that the rejection of consent to transfer the said land to the plaintiff by the Director had radically changed the circumstances of the case as transfer of the said land had become impossible. Reliance was placed on the case of ***Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd*** **[2007] 3 CLJ 695** and section 57 of the Contracts Act 1950.

[32] In reply, learned counsel for the plaintiff submitted that there is no basis for the defendant to contend that the SPA had become frustrated because the defendant failed to perform its obligation in the SPA and the refusal by the defendant to re-submit or appeal to the Director for the requisite consent is self-induced frustration.

The principles of interpreting a contract

[33] Before we proceed to dwell on the merits of the grounds of appeal put forward by the defendant, perhaps it would be useful to state at the outset the principles of interpreting a contract. In interpreting an agreement or contract, the general rule is that words ought to be given their ordinary and natural meaning and that the intention of the parties must be considered. The court must consider the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (See ***Chitty on Contracts*, 29th edition**, paragraph 12-043).

[34] In ***Charles Grenier Sdn Bhd v. Lau Wing Hong*** **[1996] 3 MLJ 327**, the Federal Court set out the principles or guidelines for courts to follow in determining whether a binding agreement has come into existence to ensure that the law leans in favour of upholding bargains and not in striking them down willy-nilly whereby Gopal Sri Ram JCA, (as he then was), in the judgment of the Court of Appeal at p.335 D-H observed –

> "Unless the approach we have stated is adopted, a party to a contract who – after having concluded his bargain –

entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise.

Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd [1932] All ER Rep 494* where he said:

> "Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."

This principle applies not only to documents drafted by laymen, but also to those prepared by lawyers (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] 129 CLR 99*).".

[35] In ***City Investment Sdn Bhd v. Koperasi Serbaguna CUEPACS Tanggungan Bhd*** **[1985] CLJ Rep 77**, Mohd. Azmi FCJ in the judgment of the Federal Court held at page 82a-c -

> "The general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd. [1984] 1 All ER 555*). Mr. Sethu has drawn our attention to p. 560, the judgment of Piers Ashworth QC which states:
>
> > "The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are:
> >
> > (1) construction of a contract is a question of law;
> >
> > (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case);
> >
> > (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later;
> >
> > (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it."
>
> We have no quarrel with the principle of construction that a contract must be construed as at the date it was made.".

The Doctrine of Frustration

[36] In Malaysia, the doctrine of frustration is embodied in section 57 of the Contracts Act 1950 ("Act 136"). Section 57(2) of Act 136 stipulates as follows –

> "A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.".

[37] In ***Guan Aik Moh (KL) Sdn Bhd (supra),*** Gopal Sri Ram JCA (as he then was) stated that there are three (3) elements woven into the fabric of the doctrine of frustration –

(i) The event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them;

(ii) The event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective; and

(iii) The event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then section 57 does not bite.

[38] On a plain reading of subsection 57(2) of Act 136, it is evident that the section envisages some impossibility or unlawfulness of the act which the parties had not contemplated. It leads to a pertinent question as to what is such impossible act that would lead to frustration of contract. The courts, both in India and England, have held that the words "impossibility" used in section 57 of Act 136 must be interpreted in a practical form and not in its literal sense. Thus, a contract would come under the purview of section 57 of Act 136 even if it is not an absolute impossibility, but the contract has fundamentally changed, which the parties did not contemplate at the time of the agreement. (See ***Satyabrata Ghose v. Mugneeram Bangur & Co. & Anor*, AIR 1954 SC 44** and other judgment of English Courts).

[39] Section 57 of the Act 136, however, may not be applicable in situation of self-induced frustration. If the frustration is procured by, or the fault of, either party to the contract, the party at fault cannot thereafter assert that the contract has been frustrated. Self-induced frustration is not, in the eyes of the law, frustration. A case on point is ***Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*** **[1964] 2 QB 226**. Here, a charterer already in breach of contract ordered a ship to steam into a war zone, where the ship was immediately detained. It was held by the court that the charterer could not thereafter rely on the fact of the ship's detention as a ground for frustration of contract. A negligent act by the defendant may well amount to self-induced frustration because such an event is not altogether outside the control of the defendant; indeed, he is the (albeit unintentional) author of it (see, inter alia, ***Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corp Ltd*** **[1942] AC 154**).

[40] In ***Maritime National Fish Ltd. v. Ocean Trawlers Ltd*** **[1935] AC 524**, the respondents were the owners of a ship (the St Cuthbert) that had been chartered by the appellant. The ship was fitted with, and could only operate with, a type of narrow-mesh fishing net known as an "otter trawl". When the charter party was renewed, both parties knew it was illegal to use an otter trawl without a government licence. The appellant owned five trawlers and applied for five licences; only three licences were granted, and the appellants were free to choose which of their five ships would be covered. They deliberately excluded the St Cuthbert, given the free choice to include it. They were sued for the charter fee, their defence being that the charter party was frustrated because it would be illegal to fish with the St Cuthbert. Unsurprisingly, the court held that the contract had not been frustrated because the allegedly 'frustrating' event had been self-induced by the appellant. In other words, the absence of the licence had been caused by the appellants' own actions, and could not therefore be deemed a frustrating event. Accordingly they were liable to pay for the hire.

[41] In ***J Lauritzen AS v. Wijsmuller BV (The Super Servant Two)*** **[1989] 1 Lloyd's Rep 148**, Hobhouse J sought to define self-induced frustration as a 'label' that has been employed by the courts to describe those situations in which one party has been held by the courts not to be entitled to treat himself as discharged from his contractual obligations. Hobhouse asserted that frustration is self-induced where the alleged frustrating event was caused by the breach or the anticipatory breach of contract by the party claiming frustration, or where an act of the party claiming frustration broke the

chain of causation between the alleged frustration and the event, making performance impossible.

[42] Ultimately, this case reached the Court of Appeal in ***J Lauritzen AS v. Wijsmuller BV (The Super Servant Two)*** **[1990] 1 Lloyd's Rep 1**. The defendants had two vessels capable of doing this work (the Super Servant One and the Super Servant Two). The contract left the choice of vessel to the defendants. The Super Servant Two sank before the contract was performed. Prior to the sinking the defendants had decided to use that ship to transport the claimants' drilling rig and the Super Servant One had been contracted to do another job.

[43] It was held that the contract had not been frustrated by the sinking of the Super Servant Two. Upon the sinking of the ship the defendants had still been free to perform their contract with the claimants by using its sister ship, the Super Servant One. In the Court of Appeal, Lord Bingham held that frustration should not -

> "… depend on any decision, however reasonable and commercial, of the party seeking to rely on it.".

[44] We have critically considered the evidence on record, the judgment of the learned High Court Judge and the submissions of learned counsel on both sides, for which we are grateful. We are of the view that the learned High Court Judge was on firm ground when he held that the defendant had failed to prove the three elements mentioned under the doctrine of frustration in ***Guan Aik Moh (KL) Sdn Bhd (supra)*** or section 57 of the Contracts Act 1950.

[45] We are persuaded, on the reasons proffered by the learned High Court Judge, that the defendant's refusal to re-submit or appeal to the Director for the requisite consent is self-induced frustration.

[46] Learned counsel for the defendant took us through the following facts and/or evidence in support of the learned High Court Judge's decision that it is clearly a self-induced frustration –

(i) that the defendant had failed to strictly comply with the requirement of the special condition of the land title (viii) as it did not submit a proper application directly to the Director of Lands and Surveys Sarawak.

(ii) that the defendant had submitted the purported application to the Superintendent of Lands and Surveys of Bintulu Division instead.

(iii) that from the testimonies of the 2 subpoenaed independent witnesses firstly, PW1, Mr Ting Kok Tiong – the common solicitors for both parties, the irrefutable evidence that the defendant had refused or neglected to appeal directly to the Director of Lands and Surveys Sarawak for the requisite consent even though the plaintiff requested the defendant to do so.

(iv) that another subpoenaed witness, PW3, Dato' Sajeli bin Kipli, the Director of Lands and Surveys Sarawak, being the person/post named in the special condition of the title of the said land whose written consent was required for the transfer of the said land, testified and referred to other

identical or similar special condition of other lands in Bintulu which requires “the consent in writing of the Director of Lands and Surveys” for their transfers. PW3 testified that all these other lands also required consent in writing from the Director of Lands and Surveys to transfer these lands which are “conditioned for industrial land purposes” “to ensure that the land is utilised for the stated purpose”.

(v) that PW3 referring to p.20 of Bundle E (see p.446 of R/A Volume 3 Part C), testified that the letter of application for permission to deal was “addressed to the Superintendent of Land and Survey Department” of Bintulu Division. In other words, there was no application to him or addressed directly to him pursuant to special condition (viii) of the title condition of the said land.

(vi) that with further reference to the application for permission to deal itself at pp.81 to 83 of Bundle E (see pp.507-509 of R/A Volume 3 Part C), PW3 – the Director compared the “description of land under the term of title and date of registration of title under this application with the printout title of the said land at pp.16 & 17 of Bundle E” (see pp.440-441 of R/A Volume 3 Part C) and testified, “that in “the document at p.81 (see page 507 of R/A Volume 3 Part C), it stated the term of title is (perpetuity) while the date of registration of title is 22 November 1996” when in fact it was stated in the printout of title of the said land at p.16 (see p.16 of R/A Volume 3 Part C), that “the term of title… is

stated as 60 years whereas the date of registration here is recorded as 15 August 2012". In other words, the application for the requisite consent itself contained material errors or misrepresentation of facts on the respective descriptions of the said land and the date of registration of title.

(vii) that while referring to p.84 of Bundle E (see p.510 of R/A Volume 3 Part C), which was a letter, referring to a reply to another letter at p.20 of Bundle E (see p.446 of R/A Volume 3 Part C), PW3 testified that the letter at p.84 (see p.510 of R/A Volume 3 Part C) was issued by the Superintendent of Land and Survey Department Bintulu Division, which conveyed a decision, rejecting the defendant's application for the requisite consent. According to PW3, the defendant has two options, firstly to abandon the application if it refused to pursue or secondly, continue with the transfer or to submit an appeal if it wished to pursue or continue with the transfer. The defendant in the present case, decided not to appeal and opted to repudiate the contract and to refund the said deposit and part payment of the purchase price of the said land notwithstanding the plaintiff's request to lodge a proper appeal.

(viii) that it was not disputed that there was no appeal lodged to the Director of Lands and Surveys Department. PW3 confirmed this. In his testimony, PW3 also testified that the initial rejection was appealable and it was known to the

parties in this action that there was an appeal procedure for lodging an appeal to the Director against the non-granting of the consent. PW3 also testified in cross-examination that the purported appeal at pp.21 and 22 of Bundle E (See pp.442-448 of R/A Volume 3 Part C) which was addressed to the Superintendent of Land and Survey Bintulu Division, which was issued by Kadir, Wong, Lin & Co., the common solicitor, was never delivered or send. Hence, no appeal was ever lodged.

(ix) that the defendant refused to lodge an appeal to the Director for the said requisite consent even though the initial application was flawed and the chances of a successful appeal was high. In cross-examination, DW1, Lau Keat Hoo testified as follow -

> "Q: Refer to page 90 of Bundle E (see p.516 of R/A Volume 3 Part C). I put it to you the Defendant do not wish to appeal for the approval of consent to be considered by the Director of Lands and Surveys.
>
> A: I agree but time is of the essence and one of the condition as I have explained earlier in the title clause (v) which has given us a short time frame to develop the land and we risk losing the land if we do not develop the land by 2019.".

(x) that on the same issue, PW1,Ting Kok Tiong, being the common solicitor for both parties herein testified as follows –

"Q19: Refer to the letter dated 20.5.2013 at page 90 of Enclosure 60 (Bundle E) (See p.516 of R/A Volume 3 Part C), was this letter issued or signed by you? What is this letter about?

A19: Yes, I was the maker of the letter. Before I issued this letter, Mr Chieng Kai Chai of the Plaintiff had requested me to make presentation or appeal directly to the Director of Lands & Surveys for the consent to transfer the said land, so I had written this letter to the Defendant seeking oft its instruction. Given the fact that I was acting for both parties and for such application or appeal for the said consent, I had to get the mandate from the Defendant. When I issued that letter, I hoped the parties could resolve the dispute but toward that end, I need to get the mandate and instruction from both parties.

Q20: Did you get any instruction or response from the Defendant in respect of your letter at page 90 of Enclosure 60 (Bundle E) (see p.516 of R/A Volume 3 Part C)?

A20: No.".

[47] It is clear, therefore, that the doctrine of frustration applies only in circumstances where the supervening event is beyond the control of the parties to the contract. It follows that where the alleged frustrating event is caused by the deliberate act or decision of one of the parties, or by his negligence, the doctrine will not apply. In the book by *"**Sinnadurai on the Contract Act, A Commentary**",* **LexisNexis [2015]** on section 57(2) of the Contracts Act 1950, it was stated at paragraph 57.25 that -

"**Self-induced Frustration**

[57.25] Principles applicable

As a general rule, a party cannot rely on the doctrine of frustration as a defence for non-performance of a contract, if he himself had been responsible for bringing about the frustrating event; that is the event which a party relies upon as frustrating his contract must not be self-induced.

The Malaysian courts have also applied this common law principle: see *Dato Yap Peng v Public Bank Bhd [1997] 3 MLJ 484*, *CA*. The failure of the state government, one of the parties to a consent order, to perform its obligation under the order to secure an alienation of land by the relevant state authority to the other party when the state authority refused to alienate the land, was held to be a "self-induced frustration" by the Court of Appeal in *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu [2000] 2 MLJ 699*, *CA*. The refusal of the relevant state authority 'was a deliberate act of non-compliance of the consent order'; it was not a supervening event, and therefore it was not open to the respondent to rely on the doctrine of frustration.

In *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 1*, *CA*, the Court of Appeal held that a contract was not frustrated when a purchaser of a commercial property was unable to obtain a bank loan to pay the balance of the purchase price as the purchaser refused to accept the new conditions imposed by the bank in accordance with the requirements of Bank Negara. The Court of Appeal also held that if at all there was frustration, it was 'self-induced frustration' under the circumstances. The case of *Dato Yap Peng v Public Bank Bhd [1997] 3 MLJ 484*, *CA*. was applied.".

[48] In ***Hong Leong Bank Bhd v. Tan Siew Nam & Anor*** **[2014] 7 CLJ 293**, the Court of Appeal held that the party who seeks to rely on frustration must be a party who is not at fault and no blame can be imputed to him as it is trite law that a "self-induced frustration" does not discharge a party of his contractual obligations. Abdul Malik Ishak JCA in the judgment of the Court of Appeal explained at page 315E-318D –

> **"[30]** The word "impossible" is not defined in the *Contracts Act 1950*. *Section 57(2) of the Contracts Act 1950* envisages the situation where the contract becomes frustrated. Frustration puts an end to the contract. Frustration arises after the formation of the contract. The party who seeks to rely on frustration must be a party who is not at fault and no blame can be imputed to him. Lord Radcliffe in Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696, HL sets out the test to determine frustration at p. 729 of the report in these erudite terms:
>
> > ... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
> >
> > …
>
> **[33]** Abdul Hamid Omar FCJ (later the Lord President of the Supreme Court) in *Ramli Zakaria & Ors v. The Government of Malaysia* (supra), at p. 262, stated the law lucidly in this way –

> "In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.".

[34] The scope of *s. 56 of the Indian Contract Act* which is equivalent to our *s. 57 of the Contracts Act 1950* was examined by the Indian Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co And Another [1954] AIR SC 44*. There, Mukherjea J had this to say at pp. 317 to 318 of the report:

> "The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done... This much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

[35] However, it must be borne in mind that "the doctrine of frustration is to be confined to very narrow circumstances, the reason being, I think, that commercial bargains should not be lightly avoided or brushed aside merely upon a change of circumstances" (per Abdul Malik bin Ishak JC in *Ooi Yoke In (f) & Anor v. Public Finance Berhad [1993] 2 CLJ 464*; *[1993] 1 AMR 734*, *at p. 742*). And where the doctrine of frustration applies, the court will not grant specific performance (*Chong Wan Kum v. Wan Choong [1983] 1 CLJ 193*; *[1983] CLJ (Rep) 512*).

[36] It is trite law that a "self-induced frustration" does not discharge a party of his contractual obligations. In this connection, reference should be made to the following cases:

(a) *Maritime National Fish, Limited v. Ocean Trawlers Limited [1935] AC 524*, *PC*;

(b) *Dato Yap Peng v. Public Bank Bhd* (supra);

(c) *J Lauritzen AS v. Wijsmuller BV (The "Super Servant Two") [1990] 1 Lloyd's Rep 1, CA*;

(d) *Paal Wilson & Co A/S v. Partenreederei Hannah Blumenthal [1983] 1 AC 854*, *HL*;

(e) *H A Berney v. Tronoh Mines Limited [1947] 1 LNS 30*; *[1949] MLJ 4*;

(f) *Tan Hiow v. Lee Boon Chia [1958] 3 MC 173*;

(g) S*ykt Angkasa Bumiputra v. Sabah Land Development Board [1987] 1 CLJ 90*; *[1987] CLJ (Rep) 997*;

(h) *Ho Weng Leong v. Ng Kee Chin [1996] 1 LNS 89; [1996] 5 MLJ 139*; and

(i) *Cheok Hock Beng & Ors v. Lim Thian Siong & Anor [1992] 2 CLJ 1100*; *[1992] 4 CLJ (Rep) 187*.

> **[37]** The doctrine of frustration does not protect a party whose own breach of the contract brings about the frustrating event. Thus, a charterer who in breach of the contract, orders a ship into the war-zone, thereby causing the ship to be detained, cannot rely on the detention as a ground of frustration. It is in fact a self-induced frustration (*Ocean Tramp Tankers Corporation v. V/O Sovfracht*, *The Eugenia [1964] 2 QB 226, CA*; and *Uni-Ocean Lines Pte Ltd v. C-Trade SA (The "Lucille") [1984] 1 Lloyd's Rep 244*, *CA*). And according to LP Thean JA in *Lim Kim Som v. Sheriffa Taibah Abdul Rahman [1994] 1 SLR 393, CA*, at 403, the doctrine of frustration is dependent on the facts of the case. Everything boils down to the facts of the case. The present appeal is not an exception." (emphasis is ours).

[49] The evidence on record showed that at all times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA for the purchase price of the said land but the refusal of the plaintiff to perform its end of the bargain by self-induced frustration.

[50] In the premises, the challenge by the plaintiff on the ground of frustration must fail.

The Cross-Appeal

[51] Learned counsel for the plaintiff submitted that the learned High Court Judge erred in not ordering specific performance of the contract against the defendant. It was contended that the actual intention of the parties as ascertained from the contract is to complete the sale of the said land with the payment of the balance of the purchase price

stated therein. At all the times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the contract of the said land and there was no reason for the plaintiff to refuse it.

[52] It was further contended that damages are inadequate. As the subject matter of the contract is real property which is well established as unique property and true substitute cannot be found. The specific performance of the contract is the only available remedy. Reliance was placed on section 11(2) of the Specific Relief Act 1950 which stipulates as follows –

> "unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.".

[53] The following cases were cited in support of his submission –

(i) ***Chow Chin Thong v. Dr Chong Eng Leong*** **[2012] 10 CLJ 27**;

(ii) ***Loh Koon Moy & Anor v. Zaibun Sa binti Syed Ahmad*** **[1978] 2 MLJ 29**;

(iii) ***Sivapragasam Nagamany v Amaravathy v Nadeson & Anor*** **[2001] 8 CLJ706**;

(iv) ***Reignmont Estate Sdn. Bhd. v Jaya Ikatan Plantations Sdn Bhd*** **[2014] 5 CLJ 134**;

(v) ***Bandar Eco-Setia Sdn. Bhd. v Yiap Beow Soon & Anor and Another Appeal*** **[2010] 5 CLJ 556**;

(vi) ***Tan Ah Tong v Parveen Kaur*** **[2012] 10 CLJ 159**; and

(vii) ***Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd*** **[1995] 3 MLJ 192**.

[54] Learned counsel for the plaintiff posited the failure of the defendant to obtain the requisite consent does not bar specific performance. (See ***Agrokor Sdn Bhd v. Perkayuan TM (Malaysia) Sdn Bhd; Thng Bay Sng & Ors*** **(Third Parties) [2015] 6 CLJ 594**).

[55] The learned High Court Judge expressed reservations about the propriety of an award of specific performance in the circumstances of the case. We are in full agreement with the learned High Court Judge's refusal to grant relief which require express consent which had not been obtained, and should the relief be granted, the performance of which relief would contravene an express provision of the law. We agree that the Court, in the circumstances of the case, should not grant an order of specific performance of the SPA against the defendant.

[56] We are mindful that there is a long line of common law authority that specific performance is the default and appropriate remedy for a contract for the sale and purchase of land. ***Gareth Jones & William Goodhart, Specific Performance*** (**Butterworth's, 2nd Ed., 1996** stated that (at p.32) –

> "… damages are said to be impossible to assess if the contract is for the sale of, or for the disposition of, an interest in, land. Land is unique; it has a 'peculiar and special value'. Consequently, no enquiry is ever made whether damages would be an adequate remedy and would make the injured party whole. This is so even if the land is bought for resale or is one of hundreds of apparently alike apartments in a large commercial development. It is perhaps not surprising that specific performance should be granted to a purchaser of land as

> a matter of course even in these situations; a court does not enquire why a party enters into a contract, and no apartment is quite like its neighbour … (emphasis in original)…".

[57] We take the stand that it cannot be assumed that damages for breach of contract for the purchase and sale of immovable property will be an inadequate remedy in all cases.

[58] In ***Union Eagle Ltd v. Golden Achievement Ltd*** **[1997] A.C.514 at 519**, the Privy Council observed that, in some circumstances, no distinction could be drawn between land sale contracts and other commercial contracts because "land can also be an article of commerce and a flat in Hong Kong is probably as goal an example as one could find". This observation clearly implies that damages could be an adequate remedy in contracts involving land.

[59] In ***Semelhago v. Paramadevan*** **[1996] 2 SCR 425**, the availability of specific performance to the purchaser was not in issue, as the parties had conducted the case on the basis that it was available. However, the Supreme Court made statement by way of dictum that are the basis of the later decisions of the Alberta Court of Appeal.

[60] Sopinka J. gave the majority judgment in ***Semelhago (supra).*** He said at para.14 –

> "… Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to

agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance.

He continued at paras 20-22 –

… While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value.

Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief… Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available… Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate

property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.".

[61] In this instant appeal, there is no evidence on record to show that the said land is unique in the sense that there is no readily available substitute. The said land has not been uniquely identified by the parties in the SPA or in the trial.

[62] We conclude, therefore, that in the circumstances of this instant appeal, damages will be an adequate remedy in the absence of evidence to show "uniqueness" of the said land.

Assessment of Damages

[63] That, however, is not the end of the matter. Learned counsel for the plaintiff submitted that the assessment of damages should be left to the discretion of Senior Assistant Registrar who decides it according to the evidence to be addressed; the facts and circumstances of the case to be proved on the hearing of the assessment with no restriction or condition attached by the learned High Court Judge as to what method of computation or how the principles of assessment of damages shall be applied.

[64] Learned counsel for the plaintiff submitted that there was nothing to justify the learned High Court Judge in making the award of damages in lieu of specific performance under either (i) section 75 of the Contract Act 1950 **or** (ii) Clause 6 of the SPA.

[65] There is force in the submission. In our view, if the specific performance is not granted, it is an open issue how damages ought

to be assessed or whether Clause 6 of the SPA is open to be challenged at the hearing of the assessment of damages.

[66] Additionally, we also agree with the submission of the learned counsel for the plaintiff –

(i) that as section 75 of the Contracts Act 1950 or Clause 6 of the contract for the assessment of damages were also not pleaded and adjudicated by the parties at the trial and dealt with by the parties in submission at the conclusion of the trial and in the grounds of the judgment, the learned trial Judge should not have made such order for the assessment of damages under section 75 of the Contracts Act 1950 or Clause 6 of the contract at the clarification on 24.3.2016; and

(ii) that after making the decision as stated in the grounds of the judgment on 18.3.2016, the learned trial Judge was *functus officio* as far as the issue of damages is concerned.

[67] In the result, we varied the order of the learned High Court Judge in that the parties are at liberty to submit on the approach to be taken in the assessment of the damages before Senior Assistant Registrar.

Appeal No. Q-02(A)-810-04/2016
Removal of Caveat

[68] The learned High Court Judge held that pursuant to Clause 8 of the SPA, the defendant agreed and allowed the plaintiff to lodge a caveat against the said land upon signing the SPA. Consequently,

the plaintiff lodged the caveat against the said land on 8.2.2013, about 9 months after the SPA had been signed.

[69] The learned High Court Judge reasoned that based on the facts of the case, the plaintiff was entitled to lodge the caveat at that material time. Reliance was placed on the case of ***Macon Engineers Sdn. Bhd. (supra)***; ***Eng Mee Yong v. Letchumanan*** **[1979] 2 MLJ 212**.

[70] With respect, we disagree. In our view, since the learned High Court Judge had rejected the application for specific performance in respect of the said land and order the damages to be assessed by the learned Senior Assistant Registrar, the plaintiff's only interest is monetary and the plaintiff no longer had any interest to preserve the caveat.

[71] Insofar as the balance of convenience is concerned, it is well established that a critical consideration is the financial status of parties. There is no evidence on record to suggest that the defendant's finances are shaky. We see no reason to believe, and the plaintiff had not suggested, that the defendant would not be financially unable to pay damages should the plaintiff prevails at the assessment of damages proceedings.

[72] Considering the above factors as a whole, we find that the balance of convenience is tilted in favour of removing the caveat. In the result, we allowed the defendant's appeal with no order as to costs.

Conclusion

[73] Having heard learned counsel for the parties and on perusal of the record of the case, we made the following orders:-

Appeal No. Q-02(W)-809-04/2016

(a) The appeal against the findings of the High Court Judge that the SPA still subsists and that the doctrine of frustration does not apply is dismissed;

(b) The order of the High Court Judge that damages in lieu of specific performances is awarded to plaintiff to be assessed by SAR is affirmed;

(c) Parties are liberty to argue on the course to be taken in the assessment of damages before the SAR;

(d) No order as to costs; and

(e) Deposit to be refunded.

Appeal No. Q-02(A)-810-04/2016

(a) The appeal against the High Court's decision dismissing the defendant's counter-claim or removal of caveat is allowed;

(b) No order as to costs; and

(c) Deposit to be refunded.

Dated: 23rd January 2018

sgd.

(DATO' SETIA MOHD ZAWAWI SALLEH)
Judge
Court of Appeal
Malaysia

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