

**SOMY SEETHIAH**

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v.

**INTENSIFTEK (M) SDN BHD**

HIGH COURT MALAYA, IPOH

B

LEE SWEE SENG JC

[SUIT NO: 22NCVC-124-2011]

31 JULY 2013

**LAND LAW:** *Sale and purchase of property - Sale and purchase agreement - Specific performance - Whether claim for specific performance time-barred - Refusal of vendor to settle difference between redemption sum and balance purchase price - Failure of vendor to refund deposit - Whether sale and purchase agreement terminated - Whether purchaser abandoned rights for specific performance - Whether subsequent conduct of purchaser amounted to waiver of vendor's breach*

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The plaintiff purchased a piece of land and entered into a sale and purchase agreement ('S&P') dated 16 August 2004 with the defendant. The purchase price of the property was RM56,500. Having paid the 10% of the purchase price, the plaintiff waited for the redemption statement from the defendant. However it turned out that the amount owed to the chargee bank was more than the balance purchase price of RM50,850 and the defendant was not able to come up with the difference between the balance purchase price and the amount owed to the bank. Subsequently, the plaintiff issued two letters dated 7 April 2005 and 7 February 2006 to the defendant's solicitors and to the defendant which the defendant said he had not received. The letters referred the defendant to the plaintiff's earlier letters which requested the defendant to furnish the plaintiff with the redemption statement for the loan. The plaintiff contended that since there was no response from the defendant, the plaintiff could not proceed with the completion of the sale and would give notice of termination of the contract due to breach of the defendant and requested a refund of the deposit paid. Finally, the plaintiff, through his solicitors, wrote to the bank to request for the redemption sum. The bank replied that the redemption sum was more than the balance purchase price and that on 13 January 2010 the defendant was wound up. Upon settling all its debts, the

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- A defendant obtained a permanent stay of the winding up proceedings on 5 May 2011. However, the defendant refused to settle the difference between the redemption sum and the balance purchase price so that the land could be redeemed and transferred to the plaintiff. The plaintiff had been paying the quit rent since
- B year 2007 on behalf of the defendant and had also lodged two caveats to protect his right over the land. The plaintiff later discovered that the defendant had, without the plaintiff's knowledge, redeemed the land on its own. The plaintiff filed this action on 24 May 2011 to claim against the defendant for, *inter*
- C *alia*, (i) an injunction to restrain the defendant from disposing of the said land; (ii) an order for specific performance of the said land under the S&P of 16 August 2004; (iii) an order for the delivery of the title and all relevant documents for the transfer to the plaintiff upon receipt of the balance purchase. The defendant
- D raised the defence of limitation and also that the plaintiff had terminated the S&P. On the contrary, the defendant also claimed for damages for wrongful entry of the plaintiff's caveats against the land. The issues that arose for determination *inter alia* were (i)
- E whether the plaintiff's claim for specific performance was time-barred; (ii) whether the plaintiff had terminated the agreement and had abandoned his rights for specific performance by issuing letters dated 7 April 2005 and 7 February 2006; (iii) whether the defendant's failure to refund the deposit paid by the plaintiff gave the plaintiff the option to proceed with specific performance; and
- F (iv) whether the subsequent conduct of the parties have the effect of waiver of the defendant's breach.

**Held (allowing plaintiff's claim; dismissing defendant's counterclaim):**

- G (1) The plaintiff's claim was for specific performance. Under s. 9(1) of the Limitation Act 1953, it was provided that the limitation period to bring an action for recovery of land is 12 years from the date of accrual of the cause of action. In the
- H present case, the S&P was executed on 16 August 2004 and, the letter of request for redemption statement was dated 3 November 2004. If this date was taken, 12 years would expire only on 2 November 2016. This action was filed on 24 May 2011 and was well within the time limit. (paras 16 &
- I 21)

- (2) The letters of termination dated 7 April 2005 and 7 February 2006 were ineffective in terminating the S&P and even if they did, the parties have, by their subsequent conduct, waived the termination and had conducted themselves on the basis that the S&P was subsisting. The parties continued with their negotiation to resolve the problem of the redemption sum being more than the balance purchase price. The defendant did not evince any intention not wanting to fulfil the terms of the S&P and the parties never acted on the purported termination. (paras 24 & 27) A B
- (3) As the plaintiff's termination of the S&P was subject to the refund of the deposit paid and a further sum of RM5,650 as damages, the defendant's non-acceptance of those terms would give the option to proceed as if the S&P had not been terminated and to proceed with specific performance. On the facts, the defendant took no initiative and indeed did not refund the deposit to the plaintiff. Thus, the plaintiff could not be said to have abandoned his rights to sue for specific performance. (paras 29, 32 & 33) C D
- (4) The plaintiff had taken further steps to enforce his rights by lodging two caveats on the said land and the defendant had not applied to the court for the removal of the caveats. The plaintiff had also obtained a consent order that the caveat was to remain until the disposal of the suit. In the event the defendant was of the opinion that the caveat should be removed, the defendant should have applied to court to remove the plaintiff's caveat. Therefore, the caveat was rightfully entered by the plaintiff to protect his interest on the land and the defendant's contention was misconceived and should be dismissed. (paras 36, 38, 48 & 49) E F G

*[Ordering specific performance of the S&P by the plaintiff paying to the defendant's solicitors the balance purchase price of RM50,850 within 14 days from the date of the judgment and the defendant to sign all relevant documents to effect the said transfer to the plaintiff or his nominee.]* H

**Case(s) referred to:**

- Abdul Rahim bin Abdul Kadir & Anor v. Twenty First Century Products Sdn Bhd* [1998] 1 LNS 277 HC (*refd*)
- Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 CA (*refd*) I
- Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162 HC (*refd*)

- A** *Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] 2 CLJ 761 CA (**refd**)  
*Lim Siew Leong & Anor v. Vallipuram* [1973] 1 LNS 80 FC (**refd**)  
*Lim Sin Oo & Ors v. Cheah Tjeng Siong* [1989] 1 CLJ 953; [1989] 2 CLJ  
(Rep) 68 HC (**refd**)  
*Nasri v. Mesah* [1970] 1 LNS 85 FC (**refd**)
- B** *Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46 HC (**refd**)  
*See Hong Cheen v. Konsortium Pantaimas Sdn Bhd* [2012] 10 CLJ 151 CA  
*William v. Thomas* [1909] 1 Ch D 713 CA (**refd**)  
*Wong Leng Hung v. Krishnamurthy Nagarathnam* [2005] 8 CLJ 745 HC  
(**refd**)
- C** **Legislation referred to:**  
Specific Relief Act 1950, ss. 6(1)(a), (b), 9(1), 11(1)  
  
*For the plaintiffs - P Selvaraj; M/s Raj & Co*  
*For the defendant - T S Dhaliwal; M/s A S Dhaliwal*
- D** *Reported by Sandra Gabriel*

## JUDGMENT

**E** **Lee Swee Seng JC:**

- [1]** The plaintiff wanted to purchase a piece of land in the district of Batang Padang in the State of Perak. He entered into a sale and purchase agreement (S&P) with the defendant. There was nothing unusual about any of its terms. Having paid the usual
- F** 10% of the purchase price he waited for the redemption statement from the defendant. However it turned out that the amount owing to the chargee bank was more than the balance purchase price. The defendant was not able to come up with the difference
- G** between the balance purchase price and the amount it owes the bank.

**Problem**

- [2]** The S&P was dated 16 August 2004. The purchase price of the property was RM56,500. The 10% deposit paid was
- H** RM5,650. The balance purchase price was RM50,850. The plaintiff's loan was RM35,000. The plaintiff deposited with his solicitors as stakeholders the differential sum between the loan and the purchase price. It was RM15,850.

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**[3]** There was a problem to completing the sale and purchase as stated. The redemption sum being more than the balance purchase price and the defendant was unable to come up with the difference. The defendant was having some cash flow problem. A

**[4]** The plaintiff wondered how long he would have to wait for the completion. Two letters were issued by his solicitors – one to the defendant's solicitors which the defendant said he did not hear from the said solicitors and the other addressed to the defendant which the defendant said he did not receive. The first letter was dated 7 April 2005 and the second dated 7 February 2006. The contents were more or less the same with each other. The first was issued by the plaintiff's solicitors Messrs C K Leong & Co for the S&P to Messrs S Mathavan & Nur Hafiza, the defendant's solicitors for the S&P. The second by Messrs C K Leong & Co to the defendant direct. B  
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**[5]** The first letter referred to previous letters of the plaintiff's solicitors dated 11 March 2004, 12 December 2004 and 5 January 2005 requesting the defendant to furnish them with the redemption statement for the loan that the defendant had taken from Bank Pertanian Malaysia Berhad and lamenting that the solicitors for the defendant had not replied. E

**[6]** The first letter of 7 April 2005 reads:

Despite our letters dated 11/3/2004, 12/12/2004 & 5/1/2005 requesting your client to let us have the redemption statement for the loan which your client has taken from Bank Pertanian Malaysia Berhad, you have not replied to our letters nor given the redemption statement. F

In the circumstance our client cannot proceed with the completion of the sale and would give notice of termination of the contract due to breach by your client. G

We are instructed to demand the refund of the deposit paid by our client and a further sum of RM5,650.00 as damages due to the non-compliance by our client. H

**[7]** It threatened legal action if the sum of RM11,300 is not paid within seven days from the date of the said notice. I

- A **[8]** The second letter to the defendant dated 7 February 2006 reads:

Your lawyer have still not replied to our letters to inform us of the redemption sum due to Bank Pertanian Malaysia Berhad.

- B In the circumstances we hereby demand the return of the sum of RM5,650.00 paid to you plus a further sum of RM5,650.00 as agreed liquidated damages.

- C If the said sum is not paid to our client or to us within fourteen (14) days hereof, we have firm instruction to commence legal proceedings against you.

**[9]** There was no reply to both letters. The defendant through DW1 said that the defendant did not receive the two letters and did not know its contents.

- D **[10]** However there was a subsequent meeting in March 2006 at Bank Pertanian where both the plaintiff and DW1 together with an officer of the bank met to discuss the redemption statement.

- E **[11]** Finally the plaintiff through his solicitors wrote to the bank by letter dated 20 September 2007 to request for the redemption sum. On 2 October 2007 the bank replied to say that the redemption sum is more than the balance purchase price. On 13 January 2010 the defendant was wound up by the Standard Chartered Bank Malaysia at the Shah Alam High Court and the official receiver (OR) was appointed the liquidator.
- F

- [12]** There were several meetings between the plaintiff and the OR on how best to transfer the land to the plaintiff. As the defendant refused to recognise the plaintiff's interest in the land, the plaintiff proceeded on 14 April 2011 to apply for leave of the court to commence an action for specific performance against the defendant. However the defendant obtained a stay of the winding up proceedings. The defendant obtained a permanent stay of the winding up proceedings on 5 May 2011 after the defendant had settled all its debts but for the defendant refused to settle the difference between the redemption sum and the balance purchase price so that the land may be redeemed and then transferred to the plaintiff. The plaintiff was at all times able, willing and ready to pay the balance purchase price.
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**[13]** The plaintiff later discovered that the defendant had quietly and without the plaintiff's knowledge redeemed the land on its own. A

### Prayers

**[14]** The plaintiff filed this action on 24 May 2011 to claim against the defendant for the following: B

- (i) An injunction to restrain the defendant from disposing of the said land;
- (ii) An order for specific performance of the said land under the S&P of 16 August 2004, C
- (iii) An order for the delivery of the title and all relevant documents for the transfer to the plaintiff upon receipt of the balance purchase price of RM50,850 from the plaintiff; D
- (iv) Damages to be assessed;
- (v) Such further and other reliefs; and
- (vi) Interest and costs. E

**[15]** The defendant raised the defence of limitation and also that the plaintiff had terminated the S&P. The defendant also claimed for damages for wrongful entry of the plaintiff's caveats against the land. F

### Principle

*Whether The Plaintiff's Claim For Specific Performance Is Time-Barred*

**[16]** The plaintiff's claim is for specific performance. The plaintiff submitted that limitation has not set in for under s. 9(1) of the Limitation Act 1953 it is provided that the limitation period to bring an action for recovery of land is 12 years from the date of accrual of the cause of action. The defendant instead had relied on ss. 6(1)(a) and (b) of the Limitation Act 1953 that any action relating to a contract and that includes to seek the remedy of specific performance and/or recovery of monies or damages is six years from the date on which the cause of action accrued. G  
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- A [17] The Federal Court held in the case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, through His Lordship Gill FJ that:

It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

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- [18] In *Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46; [1959] MLJ 86 (CA) it was held that:

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... Sect 9 ... expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

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- [19] Support for the above proposition can be found in *William v. Thomas* [1909] 1 Ch D 713 (CA) where it was held that:

“the expression “to recover land” in s.2 of the Act of 1833 (in *pari materia* with Section 9) does not mean regain something which the plaintiff previously had and has lost, but means “obtain” any land by judgment of the court”, yet it is not limited to the meaning “obtain possession of any land by judgment of the court”.

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- F [20] In *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162; [2009] 3 AMR 425 p. 438 it was held as follows:

On the facts s 9 of the Act was applicable as this was an action to recover land, namely the said property arising from the exercise of the option by the plaintiff. Therefore, as the limitation period was 12 years from the date on which the right accrued, the plaintiff's action was well within the 12 years limitation period.

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For purposes of limitation, time begins to run from the date of infringement or threat of infringement of the plaintiff's right under the agreement. In this case, the limitation period began to run from the moment when it became clear that the defendant had no intention of transferring to the plaintiff the title to the said property.

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[21] In the present case, the S&P was executed on 16 August 2004. The defendant failed to obtain the redemption statement. The letter of request for redemption statement was dated 3 November 2004 (p. 231 – Bundle B). If this date is taken, 12 years will expire only on 2 November 2016. This action was filed on 24 May 2011 was well within the time limit.

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*Whether The Plaintiff Has Terminated The Agreement And Has Abandoned His Rights For Specific Performance*

[22] The crucial question is whether by issuing the letters dated 7 April 2005 and 7 February 2006, did the plaintiff terminate the said S&P and had abandoned his rights for specific performance?

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[23] The plaintiff's counsel Mr Selvaraj submitted that the plaintiff did not terminate the said agreement nor abandon his rights for specific performance. The reasons are as follows:

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(a) The letter dated 7 April 2005 was addressed to the defendant's solicitors for which no response was received;

(b) The letter dated 7 February 2006 was addressed directly to the defendant and there was no response from the defendant;

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(c) Plaintiff in his evidence stated that he did not instruct his solicitors, Messrs C K Leong & Co to send those two letters;

(d) Since no response from the defendant/vendor or vendor's solicitors, plaintiff solicitors decided to write in directly via letter dated 20 September 2007 to the vendor's financier for the redemption statement;

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(e) DW1 who is Mr Murugan, who called himself the company advisor to the defendant, in his evidence confirmed that he did not receive and is unaware about the two letters;

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(f) The defendant did not refund the deposit paid by the plaintiff despite having the opportunity to do;

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(g) On the invitation of Mr Murugan, the plaintiff in his evidence confirmed that the plaintiff, his wife, Mr Murugan, the representative from the defendant company and Mr Kumar were at the Bank Pertanian's office in early March, 2006 met a bearded Malay officer to discuss to resolve the redemption issue;

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- A (h) The vendor's financier replied *via* letter dated 2 October 2007. In their said letter, the vendor's financier confirmed that a letter dated 23 December 2005 was given to the vendor as to the terms of settlement. The purchaser had also approached the vendor's financier in regard to settlement and the terms of
- B the letter had expired and that the financier had so informed the parties through their letter dated 5 April 2006; and
- (i) The purchaser has been paying the quit rent since year 2007 on behalf of the vendor and this fact is not disputed by the
- C defendant.

[24] Mr Selvaraj further contended that the letters of termination dated 7 April 2005 and 7 February 2006 are ineffective in terminating the S&P and that even if they had that effect, parties have by their subsequent conduct waived the termination and had

D conducted themselves on the basis that the S&P is subsisting.

[25] The defendant contended through its counsel Mr Dhaliwal in its defence that by the virtue of the two letters of termination, the plaintiff has abandoned his rights to seek order for specific

E performance. However, during the cross-examination, DW1 has got these to say:

Plaintiff's Solicitor: When did you came aware of this two letters, when did you came to know? Pages 235 and 236.

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DW1: This is, I don't know.

Plaintiff's Solicitor: First notice you are not aware, notice at p. 235, you are not aware at all, agreed?

G DW1: Yes

Plaintiff's Solicitor: At p. 236, they sent to your lawyer, this also you are not aware?

H DW1: Yes, I am not aware because the company is no more existing at that address.

Plaintiff's Solicitor: I put it to you that these two notices were never received by you.

I DW1: Yes

[26] Mr Selvaraj referred to the case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, where His Lordship Gill F. observed as follows: A

As there is no evidence that that letter reached the defendant, the position would therefore appear to be that there never was any refusal by the defendant to carry out her obligations under the contract. B

[27] What can be discerned from the subsequent events after the two letters of termination were issued was that the parties continued with their negotiation to resolve the problem of the redemption sum being more than the balance purchase price. The defendant did not evince any intention not wanting to fulfil the terms of the S&P and the parties never acted on the purported termination. C

*Whether The Defendant's Failure To Refund The Deposit Paid By The Plaintiff Gives The Plaintiff The Option To Proceed With Specific Performance* D

[28] Mr Selvaraj submitted that the defendant did not make any attempt to refund the deposit paid by the plaintiff despite having the ample opportunity to do the same. In cross-examination, DW1 had these to say: E

Plaintiff's Solicitor: I am talking about the time in 2006.

DW1: As far as I am concern, I always called him to get back his money, by verbal, through phone but he refuse, his stand was firm, he wanted back the land. F

Plaintiff's Solicitor: He was represented by a solicitor, you were represented by a lawyer, why didn't you or your solicitor sent the money over to him? G

DW1: First of all he must agree to the agreed condition, all the way he wanted the land, he wanted the land. H

Plaintiff's Solicitor: You agree that all the while, he only wanted the land?

DW1: Yes I

- A [29] It is not disputed that the defendant did not refund the deposit paid to the plaintiff if indeed the defendant had accepted the terms of the termination. As the plaintiff's termination of the S&P was subject to the refund of the deposit paid and a further sum of RM5,650 as damages, the defendant's non-acceptance of
- B those terms would give the option to proceed as if the S&P had not been terminated and to proceed with specific performance. In *Wong Leng Hung v. Krishnamurthy Nagarathnam* [2005] 8 CLJ 745 at p. 750; [2004] MLJU 622 at pp. 13 and 14, His Lordship Azmel J (as he then was) observed:
- C Secondly, in order for the Defendant to effectively terminate the said Agreement it would be incumbent upon him to refund all the monies paid by the Plaintiff. And in this case the purchase price paid by the Plaintiff was RM472,000.00. Not even a sen had been refunded by the Defendant to the Plaintiff. Based on the
- D Defendant's termination letter and the ground given, I am not very certain that the Defendant was entitled to forfeit the Deposit of RM36,000.00 because the letter of 6th June 1995 did not say that the Plaintiff's breach was due to non-payment of any part of the purchase price. Since the Defendant when issuing the
- E termination letter, did not refund to the Plaintiff the monies the Plaintiff had paid in respect of the purchase price, the termination of the said Agreement by the Defendant would have no legal effect until such time the Defendant had fully refunded the amount of monies paid by the Plaintiff. This requirement is clearly provided under Clause 4 of the said Agreement.
- F In the circumstances I allowed the Plaintiffs claim for specific performance of the said Agreement as prayed under Prayer 2(c) and (d). I also allowed Plaintiff's claim under Prayers 3, 4, 5, 6 and 7.
- G [30] Though in the above case it was a purported termination by the vendor, yet the same would apply with equal force where it is the purchaser terminating and the vendor refused or failed to refund the deposit.
- H [31] The plaintiff's counsel also referred to the case of *Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] 2 CLJ 761 at p. 771; [2000] 1 MLJ 466 at p. 474 in which the Court of Appeal held that:
- I There was no evidence by the first defendant that the payments were not received or the payments received were without prejudice or that those payments were returned. The failure on the part of the first defendant to do so would warrant the above-stated letter as notice of demand being nullified.

**[32]** Based on the facts and authorities, the defendant took no initiative to and indeed did not refund the deposit back to the plaintiff. The plaintiff could not be said to have abandoned his rights to sue for specific performance. **A**

**[33]** Whilst the defendant in its defence contended that the plaintiff had abandoned his rights to sue for specific performance the answers given by the DW1 during cross-examination indicated otherwise as follows: **B**

Plaintiff's Solicitor: If at all you became aware of these notices, was the company in position to refund back the money? **C**

DW1: Yes, all times we requested the ...

Plaintiff's Solicitor: I am talking about the time in 2006. **D**

DW1: As far as I am concern, I always called him to get back his money, by verbal, through phone but he refuse, he stand by firm, he wanted back the land.

Plaintiff's Solicitor: He was represented by a solicitor, you were represented by a lawyer, why didn't you or your solicitor sent the money over to him? **E**

DW1: First of all he must agree to the agreed condition, all the way he wanted the land, he wanted the land. **F**

Plaintiff's Solicitor: You agree that all the while, he only wanted the land?

DW1: Yes **G**

Plaintiff's Solicitor: He didn't wanted a refund?

DW1: Yang Arif, he only wanted the land, he can settle the cukai tanah, he can settle the stamp duty, he can settle this, why not he settle, he want the settle the stamp duty, he can settle the Bank Pertanian redemption also. We no cruel intention to him because we already sign everything for him. **H**

**I**

A        Plaintiff's Solicitor: So you agree that the Plaintiff only wanted the land, just answer the question.

DW1: Exactly.

B        [34] The court is left in no doubt that the defendant knew all along that the plaintiff's firm stand was that he only wanted the land and not damages and this was reaffirmed by the defendant's witness, DW1. The defendant never acted on to the two letters of termination which he said he did not receive and which contents he was unaware. In all likelihood his solicitors also did not receive the said letter sent to them because they had shifted office from that address. At any rate the defendant did not call its solicitors to testify that they did receive the said letter of termination and that their knowledge would be their client's knowledge. See the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770.

*Whether The Subsequent Conduct Of The Parties Have The Effect Of Waiver Of The Defendant's Breach*

E        [35] Plaintiff is his examination-in-chief, cross-examination and re-examination firmly stated that he received a call from Mr Murugan to meet him at the Bank Pertanian somewhere in March 2006. At the meeting, plaintiff and his wife together with Murugan (DW1) and one Mr Kumar was there and saw a Malay officer with beard. During the meeting, the officer concerned told them that the outstanding was about RM61,000. After the discussion, Mr Murugan (DW1) gave a lift back to the plaintiff and his wife to Kuala Lumpur and drop them off at KTM station at Shah Alam. During the cross-examination, DW1 had these to say:

G        Plaintiff's Solicitor: I put it to you that after the meeting, you gave them a lift back to Kuala Lumpur.

DW1: I couldn't remember.

H        Plaintiff's Solicitor: You couldn't remember?

DW1: Yes.

I        [36] I am inclined to agree with the plaintiff's evidence. If the said event had not happened I would have expected DW1 to say an emphatic 'No'! It is not ever so often that a vendor would give a purchaser a ride in his car from Ipoh to Kuala Lumpur, in a

journey about 2 1/2 hours without having any recollection of it. The evidence given by DW1 seems to suggest that there was actually a meeting held in Bank Pertanian in March, 2006 and that DW1 was evading the actual fact. Conduct of the parties clearly suggest that there were negotiations to settle the redemption sum even after the date of the two letters even though the defendant has no knowledge about the two letters. I would agree with the plaintiff that the conduct of the parties clearly shows the plaintiff did not in any way abandon his rights and that it would be fair to say that the parties have conducted themselves at all material times on the basis that the S&P was still subsisting.

[37] In the case of *Lim Siew Leong & Anor v. Vallipuram* [1973] 1 LNS 80; [1973] 1 MLJ 241 the court held that:

the respondent in the present case had clearly elected to treat the contract as in force notwithstanding the appellant's default and therefore the claim for damages was not sustainable as an independent claim.

[38] It is clear that the plaintiff did not abandon his rights but taken further steps to enforce his rights. In fact he had also lodged a caveat on the said land. The first caveat was lodged on 1 July 2005 and as it has only a lifespan of six years, the second caveat was lodged on 24 June 2011. The defendant has not successfully removed the plaintiff's second caveat.

[39] To further support his position learned counsel Mr Selvaraj further referred to the case of *Lim Sin Oo & Ors v. Cheah Tjeng Siong* [1989] 1 CLJ 953; [1989] 2 CLJ (Rep) 68; [1989] 2 MLJ 44 wherein the court held that:

An agreement is rescinded only when there is a total abandonment of the whole contract. The parties had continued to negotiate after the issue of the notice, and upon the failure of the negotiations, the plaintiffs issued another notice. The conduct clearly negated any intention to abandon the contract. There was therefore no rescission of the agreement.

The plaintiffs had suffered loss and damage. In the circumstances of the case, damages would not be an adequate remedy to the plaintiffs and the agreement between the plaintiffs and the defendant is ordered to be specifically enforced and carried into execution.

A [40] There was also the case of *Abdul Rahim bin Abdul Kadir & Anor v. Twenty First Century Products Sdn Bhd* [1998] 1 LNS 277; [1998] 7 MLJ 222 which reaffirmed the principle in *Lim Sin Oo & Ors v. Cheah Tjeng Siong* wherein the court held that:

B On the facts, there was no basis to hold that the plaintiffs had rescinded the contract. In any case, being unwilling to go through with the contract is a far cry from repudiating it. On the contrary, the correspondence included in the common agreed bundle of documents indicated the plaintiffs' intention of completing the contract.

C [41] Finally he drew the court's attention to the case of *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162; [2009] 3 AMR 425 at p. 438 wherein the court held that:

D On the facts, justice clearly lay in favour of the plaintiff for the grant of the relief of specific performance. Clause 12 of the said agreement specifically provides this option to the plaintiff, and the plaintiff had done all that was necessary to enforce its right under clause 12.

E [42] There is the further conduct of the plaintiff and it was also not disputed that the plaintiff has been paying the quit rent from year 2007. DW1 confirmed in his cross-examination that the plaintiff has been paying the quit rent since 2007. During cross-examination, DW1 has these to say:

F Plaintiff's Solicitor: You agree that he has been paying quit rent for the land.

G DW1: Yes, I saw in the ... except only they did not pay the redemption.

Plaintiff's Solicitor: The quit rent he has been paying from 2007?

DW1: Yes.

H Court: From 2007, he has been paying?

Plaintiff's Solicitor: Yes my Lord, even 2013 he has paid.

[43] Section 11(1) of the Specific Relief Act 1950 is clear. It states:

I Except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the court be enforced.



[44] The case of *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162; [2009] 3 AMR 425 highlights the approach the court should take in a claim for specific performance of a sale and purchase agreement on land: A

In cases involving immovable property such as this case, pursuant to s. 11(2) of the Specific Relief Act 1950, there is a presumption in favour of the grant of the equitable remedy of specific performance of the contract. B

Being an equitable remedy, specific performance is intended to do justice between the parties and in the circumstances of the present case, justice clearly lies in favour of the plaintiff for the grant of the relief of specific performance. C

[45] In the case of *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162; [2009] 3 AMR 425 the court held that: D

on the facts, specific performance in itself was a sufficient remedy ...

[46] The plaintiff also referred to the case of *See Hong Cheen v. Konsortium Pantaimas Sdn Bhd* [2012] 10 CLJ 151; [2012] 5 AMR 515 wherein the Court of Appeal held that: E

It is always important to consider whether the balance of justice or convenience lie in favour of the private caveat remaining on the register or whether it favours its removal. F

[47] I agree with the plaintiff that in the event the defendant is of the opinion that the caveat should be removed, the defendant should have applied to court to remove the plaintiff's caveat under the provisions of the National Land Code. The defendant chose not to do so. G

[48] Further, the plaintiff had obtained a consent order dated 21 September 2012 *via* suit No. Usul Pemula No. 25-45-05/2012 wherein the caveat entered by the plaintiff is to remain until the disposal of this suit. H

[49] Therefore, the caveat was rightfully entered by the plaintiff to protect his interest on the land and that the defendant's contention is misconceived and therefore should be dismissed. I

**A Pronouncement**

**[50]** In the upshot I had ordered the specific performance of the S&P by the plaintiff paying to the defendant's solicitors the balance purchase price of RM50,850 within 14 days from the date of the judgment and the defendant to sign all relevant documents to effect the said transfer to the plaintiff or his nominee and if the defendant fails to sign, the Senior Assistant Registrar shall hereby be authorised to so sign all relevant and necessary documents.

**[51]** I also ordered the issue document of title to be delivered by the defendant to the purchaser upon receipt of the balance purchase price.

**[52]** The defendant's counterclaim for removal of the plaintiff's caveat on the land and for damages arising out of the caveat of the land was dismissed.

**[53]** As the plaintiff's counsel was not pressing for costs, I made no order as to costs.

**E**

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**F**

**G**

**H**

**I**