

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

ORIGINATING SUMMONS NO. S5-24-789-2007

BETWEEN

YONG YOKE KUAN

.....PLAINTIFF

AND

1.ABS LAND & PROPERTIES BERHAD

**2. CITY VALUERS & CONSULTANT
SDN BHD**

... DEFENDANTS

GROUND OF JUDGMENT

The Plaintiff filed an Originating Summons against the Defendants for an order of:

- a) a declaration and specific performance of a sale and purchase contract between the Plaintiff and the First Defendant regarding a property known as No. H.S.(D) 185476 P.T.No. 325 in Pekan Baru Sungai Besi, Daerah Petaling, Negeri Selangor Darul Ehsan together with a four (4) storey shop lot building on the said land with postal address No. 30, Jalan Dagang SB 4/2, Taman Sungai Besi Indah, Sek. 4, 43300 Seri Kembangan, Selangor Darul

Ehsan (hereinafter referred to as "the said property") wherein the Plaintiff have agreed to buy and the First Defendant has agreed to sell at RM725,000.00.

- b) In the alternative the Plaintiff is seeking for damages for breach of contract from the Defendants.

BACKGROUND FACTS

The 1st Defendant is the registered owner of a four (4) storey shophouse at Taman Sungai Besi Indah.

The 2nd Defendant is a real estate agent of the 1st Defendant and is in charge of the sale of any of the 1st Defendants' property subject to the consent granted by the 1st Defendant.

The Plaintiff is a registered real estate agent practicing under Lucky Realty.

In or around October 2005, the Plaintiff contacted the Second Defendant regarding his intention to purchase the said property for investment purposes. However the Second Defendant's staff informed Plaintiff that they intended to sell not only the said property i.e. unit no. 30 but also the adjoining unit no. 32 and the price for both the units would be RM 1.6 million and the price quoted was negotiable.

After negotiations with the 2nd Defendant, the Plaintiff made an offer to purchase both the units with the purchase price of RM 725,000.00 on 5th December 2005 vide the Letter of Offer ("Letter of Offer") and presented a HSBC cheque No. 076-353 dated 5th

December 2005 ("the said Cheque") for RM 29,000.00 as the 2% earnest deposit for both units.

The 2nd Defendant as the agent of the 1st Defendant issued an official receipt no. 12976 to the Plaintiff being 2% earnest deposit for the purchase of the said property. (exhibited as "YYK-3" in Enclosure 2).

Subsequently, the Plaintiff through Lucky Realty managed to get a tenant (Hi-Tech Utama Sdn Bhd) for the 2nd floor of unit no. 30 and 32 at a rental of RM 2,600.00 per month for a period of two (2) years commencing from 1.2.2006. The tenant through Lucky Realty signed Letter Of Offer To Rent and issued to the 1st Defendant a Public Bank cheque no. 666780 amounting to RM 10,400.00 as payment for security deposit, utility and IWK deposit together with advance rental payment. The 2nd Defendant issued an official receipt no. 12978 to the tenant (copy of letter of offer to rent, Public Bank cheque and official receipt is exhibited as "YYK-4" in Affidavit In Support).

The Plaintiff's solicitors, vide letter dated 28.12.2005 forwarded the Draft Sale And Purchase Agreement pertaining to the said property to the solicitors for the 1st Defendant. Thereafter the Plaintiff's solicitors forwarded a letter dated 9.1.2006 to the 1st Defendant's solicitors to enquire on the status of the Draft Sale And Purchase Agreement (exhibited as "YYK-S" in Affidavit In Support).

However the 2nd Defendant vide letter dated 23.1.2006 had informed Lucky Realty that the transaction regarding the sale and

purchase of the said property is terminated with immediate effect because the 1st Defendant had rejected the Plaintiff's offer and the earnest deposit payment would be returned to the Plaintiff (copy of letter dated 23.1.2006 from 2nd Defendant is exhibited as "YYK-6" in Enclosure 2)

Thereafter the 2nd Defendant vide letter dated 20.2.2006 wrote to Lucky Realty forwarding the earnest deposit amounting to RM29,000.00 for both the units by a cheque issued by the 2nd Defendant (copy of letter dated 20.2.2006 from the 2nd Defendant and the cheque is exhibited as "YYK-9" in Enclosure 2)

The earnest deposit cheque was returned back to the 2nd Defendant by Lucky Realty vide letter dated 1.3.2006 (copy of letter dated 1.3.2006 is exhibited as "YYK-10" in Enclosure 2)

Thereafter the Plaintiff filed this suit against the 1st Defendant for specific performance of the contract and alternatively for breach of contract.

Issues to be determined:

- a) Whether Originating Summons a suitable mode for the Plaintiff's Claim;
- b) Whether there is a concluded contract between the Plaintiff and the 1st Defendant?
- c) Whether the Receipt and Realisation of Said Cheque is deemed Acceptance of the Plaintiff's Offer?

The Findings of the Court

The 1st Issue: Whether Originating Summons a suitable mode for the Plaintiff's Claim

I am of the view that there are disputes as to the facts as follows:

The Plaintiff had alleged that there was already a valid contract in existence when the Plaintiff made an offer to purchase both the units with the purchase price of RM 725,000.00 on 5th December 2005 vide the Letter of Offer, had paid earnest deposit and a draft Sales and Purchase Agreement had been prepared.

The Defendants denied that there was acceptance of the offer by the Plaintiff. It was premature for the Plaintiff to prepare a draft Sales and Purchase Agreement. The Defendant further contends that the receipt of the earnest deposit is for the Defendants to consider whether to accept the offer by the Plaintiff, but that does not amount to an acceptance of the offer by the Plaintiff.

The Plaintiff had also alleged that the 2nd Defendant had made several representations to the Plaintiff which binds the 1st Defendant which the 2nd Defendant denied have ever taken place. (Refer to the affidavit by the 2nd Defendant in enclosure 7 which explains as to what actually happened when negotiating as to the price of the property with the Plaintiff and the assertion of the 2nd Defendant that the offer by the Plaintiff was way below the price as advertised, however the offer by the Plaintiff would be communicated to the 1st Defendant for its consideration).

Therefore there are several factual disputes which needs to be determine by calling witnesses and Originating Summons is not the correct mode to institute the Plaintiff's claim in this case.

2nd Issue: Whether there is a concluded contract between the Plaintiff and the 1st Defendant

Since there are contradictory versions presented in the affidavits, this issue needs to be determined at a full trial.

From the facts the Plaintiff had forwarded the letter of offer to the 1st Defendant. The mode of acceptance by the 1st Defendant is prescribed by the Plaintiff's own terms whereby the 1st Defendant is required to sign its acceptance of the Plaintiffs offer by entering its signature in that portion of the Letter of Offer which is titled "Vendors Acceptance". From the Plaintiff's Letter of Offer To Purchase in Exhibit "YKK-2", the column "Vendor Acceptance" is not signed by the 1st Defendant, nor by the 2nd Defendant. The 1st Defendant in its affidavit stressed that the offer made by the Plaintiff had never been accepted. The rubber stamp chop pf the 2nd Defendant which is present on the letter of Offer To Purchase and on the photostated copy of the cheque (Exhibit YKK-2) is merely as an acknowledgment of receipt of the letter of Offer To Purchase and the cheque, for the 1st Defendant to consider the offer made by the Plaintiff.

The letter Of offer from the Plaintiff prescribed a mode of acceptance of the offer, i.e the 1st Defendant to sign his acceptance on the letter of Offer. Therefore unless the 1st

defendant signed in the space of the "Vendor's Acceptance" in the Letter of Offer, there is no valid contract yet formed.

Refer to section 7 (b) of the Contracts Act 1950 which states as follows:

"In order to convert a proposal into a promise the acceptance must-

(a)

(b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner in which it is to be accepted, and the acceptance is not made in that manner, the propose may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise;but if he fails to do so, he accepts the acceptance"

In the case of ***Ho Kham Phaw v Fam Sin Nin*** [1998] 2 MLJ 713, at page 718 which states as follows:

"Method must generally be complied with. An offer which requires the acceptance to be expressed or communicated in a certain way can generally be accepted only in that way."

To determine whether there is a concluded contract there must be a firm offer and a firm communication of the acceptance of the offer, i.e a meeting of the mind upon a common purpose. In our case here, from the facts and circumstances there has not been a communication of a firm acceptance to the offer made by the

Plaintiff. Refer to the case of ***Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of saw Cheng Chor, Deceased) & Anor*** [1997] 1 MLJ 763.

Therefore, for the above reasons, I concluded that there has not been a concluded contract between the parties.

3rd Issue: Whether the Receipt and Realisation of Said Cheque is deemed Acceptance of the Plaintiff's Offer

The Plaintiff contends that a concluded contact had been formed upon the acceptance of the earnest deposit by the 2nd Defendant and upon the clearance of the cheque of earnest deposit. The 1st Defendant maintain that this does not connote the acceptance of the Plaintiff's offer to purchase but merely for the 1st Defendant to consider the proposal by the Plaintiff along with other proposals.

The Plaintiff cited the case of ***Lim Keng Siong & Anor v Yeo Ah Tee*** [1983] 2 MLJ 39 as support for its contention, however that case was decided upon after a full trial, and it was premised upon the fact that the Defendant(vendor) had orally accepted the offer of the Plaintiff and had neither objected nor deny to the Plaintiff's letter dated 5.3.1976 whereby the Plaintiffs had confirmed the sale. Further the Defendants in that case had not only accepted the 10% deposit money enclosed in the 5.3.1976 letter of the Plaintiffs but also accepted another further deposit of 10 %. Compare to our present case where the mode of acceptance had been prescribed by the Plaintiff, and the Defendants have not accepted the offer by the Plaintiff.

The case of *Nai Yau Jun v Pasdec Corp Sdn Bhd & Anor* [2005] 3 MLJ 431 illustrates the point that a payment of a booking fee by the Plaintiff does not constitute as to acceptance of offer. The learned Judge also held that the official receipt issued by the Defendant in respect of the booking fee does not amount to an acceptance of an offer.

Therefore, from the facts as deposed in the affidavits, the acceptance of the earnest deposit and the realization of the cheque for the earnest deposit does not constitute a concluded contract.

Thus, for the above said reasons, I dismissed the application by the Plaintiff in Enclosure 1 with costs.

Datin Zabariah Mohd Yusof

Tarikh : 5.6.2009

Bagi Pihak Plaintiff : Encik M.Seetha
Tetuan Chye, Chow, Chung & Co.

Bagi Pihak Defendant : Cik Nalani Murugiah
Tetuan Thangaraj & Associates.